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In The

Supreme Court of the United States

CHARLES GERSTEN,

Petitioner,

v.

ETHEL JOYCE GERSTEN,

Respondent.

On Petition For A Writ Of Certiorari To Division One Of The Arizona Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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In Propria Persona

QUESTIONS PRESENTED

Approximately three weeks after the close of an extended bench trial in a dissolution of marriage action, the trial judge suddenly and unexpectedly resigned. The trial judge having declined to rule or enter findings of fact in the case; a successor judicial officer proceeded to rule in the action under Arizona Rule of Family Law Procedure 88. The successor judge "heard" the case and decided witness credibility by watching video recordings of the extensive trial and reviewing parties' written closing arguments.

As amended Arizona Rule of Family Law Procedure 88, permits a successor judicial officer in family court actions to decide a case based upon the successor judicial officer's viewing of "adequate" electronic recordings of the trial proceedings held by their predecessor. From this, the following questions arise under the due process and privileges or immunities clauses of the Fourteenth Amendment:

1. Whether a successor judge deprives a party of their right to due process by hearing, determining witness' credibility and deciding a case based upon watching video recordings of a trial held before their predecessor.

2. Whether the due process protections of the Fourteenth Amendment to the United States Constitution require a successor judge to be familiar with all relevant portions of a case's record before they may proceed with and rule in the case.

QUESTIONS PRESENTED – Continued

3. Whether the amended form of Arizona Rule of Family Law Procedure 88 violates the due process or privileges or immunities clauses of the Fourteenth Amendment by limiting the right to due process of family court litigants whose case is taken over by a successor judge.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Gersten, respectfully petitions for a writ of certiorari to review the judgment of Division One of the Arizona Court of Appeals.

DECISIONS BELOW

The Opinion of Division One of the Arizona Court of Appeals is published at 223 Ariz. 99, 219 P.3d 309 and is reprinted in the Appendix ("App.") at 1. The Memorandum Decision of the Court of Appeals is unpublished but is reported at 2009 WL 3854335 (Ariz.App. Div. 1), App. 23. The Arizona Supreme Court's Minute Letter denying review is unreported, App. 60. The Maricopa County Superior Court Decree which was appealed is unreported, App. 42.

STATEMENT OF JURISDICTION

The judgment of Division One of the Arizona Court of Appeals was entered November 17, 2009. The Court of Appeals denied a timely motion for reconsideration on January 19, 2010. On May 20, 2010, the Arizona Supreme Court denied a petition for review. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). This Petition is timely under Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Constitutional provisions involved in this case are the due process and privileges or immunities clauses of the Fourteenth Amendment.

> United States Constitution, Amendment XIV, § 1:
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Rules involved are Federal Rule of Civil Procedure 63, Arizona Rule of Civil Procedure 63, and the pre-amendment and current forms of Arizona Rule of Family Law Procedure 88 (reproduced here).

> Federal Rule of Civil Procedure 63:
>
> If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and

disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

Arizona Rule of Civil Procedure 63:

If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

Pre-amendment Arizona Rule of Family Law Procedure Rule 88 (in effect prior to January 1, 2008):

If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

Amended (current) Arizona Rule of Family Law Procedure 88:

> If a trial or hearing has been commenced and the judicial officer is unable to proceed, any other judicial officer may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. At the request of a party and if an adequate electronic record is not available, the successor judicial officer shall recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judicial officer may also recall any other witness.

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

Petitioner's case began as a dissolution of marriage action filed in the Maricopa County Superior Court on October 27, 2005. The case was assigned to Judge Gregory Martin and proceeded once Ms. Gersten accepted service of the Petition for Dissolution of Marriage. Numerous discovery disputes arose during pre-trial motion practice. Trial was held before Judge Martin on July 10, 11 and 12, 2007 before

recessing until October for discovery to be completed.[1] Trial resumed October 17 and concluded the 18th. At the close of trial, Judge Martin ordered parties to submit written closing statements by November 8th. At that time, Judge Martin acknowledged that requests had been made prior to the start of trial for express findings of fact and conclusions of law as to certain issues pursuant to Arizona Rule of Family Law Procedure 82(A). The Court stated that along with closing arguments the Court would entertain additional requests for findings of fact and proposed findings and conclusions of law, Trial Record Part 6 10/18/2007 p. 575-576.

On November 5, 2007, Petitioner's then attorney (Sonya Underwood) was contacted by Court Commissioner Susan M. Brnovich who informed Petitioner's attorney that Judge Martin had resigned and that the Commissioner would be holding a telephonic status conference on November 20 to discuss the matter. Petitioner's attorney subsequently discovered (via Notice posted on the Maricopa County Superior Court website) that Judge Martin submitted his resignation on October 30 to be effective November 30.

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[1] A telephonic contempt hearing was held October 1, 2007, regarding Ms. Gersten's repeated violations of disclosure/ discovery rules and the Court's orders.

At the November 20 Status Conference, Commissioner Brnovich[2] notified parties' attorneys that she had been assigned all of Judge Martin's calendar and that she would review the video recordings of the trial and rule in the case under Rule 63 of the Arizona Rules of Civil Procedure ("ARCP"). When asked the view of parties' counsel as to the Court's proposed course of action, Petitioner's attorney objected to the procedure Judge Brnovich contemplated using. Ms. Underwood explained that it would prejudice parties for the Court to proceed to enter findings and rule based upon viewing recordings of trial held by Judge Martin, as Judge Brnovich had not tried the case or observed the witnesses' testimony. Ms. Underwood suggested that if Judge Martin would make comprehensive findings of fact as to the issues of the case, Judge Brnovich could then incorporate those findings into a Decree and thereby not prejudice the parties in ruling in the case (Ms. Underwood's objections here are the first of seven separate times the *federal issue* was raised in the courts below).[3] Over Ms. Underwood's

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[2] At the time, that Judge Brnovich assumed the case she was a Court Commissioner acting as a Judge Pro Tempore, subsequently she was appointed a judge of the Superior Court by former Governor Janet Napolitano.

[3] In the Superior Court, the issue was raised at the November 20, status conference and in Petitioner's motion (at 5-6) and amended motion for new trial (at 5-6, 9-10).

It was raised four times in the Appellate Court, in Petitioner's Civil Appeals Docketing Statement (*Id.* at 3, 5-6), Petitioner's Opening Brief (at 16-35), Petitioner's Answering/Reply Brief

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objection, and with the concurrence of Ms. Gersten's attorney, Judge Brnovich proceeded to take the case under advisement pursuant to Rule 63, ARCP. (TR 7, 11/20/2007 p. 586-589; *also*, the Court's Minute Entry of 11/29/2007, App. 58).

On January 10, 2008 in a signed Minute Entry Judge Brnovich entered a Decree of Dissolution of Marriage. In the Decree, the materials Judge Brnovich reviewed in deciding the case, were listed:

> "Petitioner's Closing Memorandum; Petitioner's Proposed Findings of Fact and Conclusions of Law Re: Petitioner's Monies Received From the Federal Government Under F.E.C.A.;[4] and Respondent's Closing Brief."[5]

On January 25, 2008 Petitioner's then attorney, Bette Adelman, filed a Motion for New Trial (later

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(at 21-23) and in Petitioner's Motion for Reconsideration (*Id.* at 7-11, 11-14).

Finally, the issue of due process was raised in the Arizona Supreme Court in Petitioner's Cross-Petition for Review (*Id.* at 3, 5-7, 12-15).

[4] This was a pre-trial filing made in August of 2007, and not the comprehensive proposed findings and conclusions Judge Martin stated he would entertain which Petitioner's attorney filed along with her written closing in November 2007.

[5] Most remarkable in its absence is any mention that the successor judge reviewed the Petition for Dissolution of Marriage, which initiated the action and contained Petitioner's claims for relief and Ms. Gersten's Response to the Petition, containing her counterclaims and defenses.

amended on March 12) pursuant to Rule 83(A) (1), (2), (5) and (6), Arizona Rules of Family Law Procedure ("ARFLP"). On March 17, 2008, in a Minute Entry, affirmed in a signed Order, Judge Brnovich denied Petitioner's Motion for New Trial. In the denial of this Motion, the Court confirmed that the only materials that it had reviewed in deciding the case were those listed in the Decree (Order denying motion for new trial, App. 38). Petitioner then filed a Cross-Appeal with Division One of the Arizona Court of Appeals (Memorandum Decision, App. 24 ¶2-3). The issue of due process under Section One of the Fourteenth Amendment to the United States Constitution (and under Article II, Sect. 4 of the Arizona Constitution) was raised multiple times in Petitioner's appellate briefs.

On November 17, 2009, in an Opinion and Memorandum Decision the Court of Appeals ruled on the appeals in the case. On December 21, 2009, Petitioner filed a Motion for Reconsideration of the Appellate Courts ruling on the basis of numerous errors of fact and law Petitioner believes were present in the Court's decision. In this Motion, Petitioner reiterated and expanded upon the due process argument made in the appellate briefs. On January 19, 2010, the Court of Appeals denied Petitioner's Motion for Reconsideration (App. 35) whereupon Petitioner filed a Cross-Petition for Review with the Arizona Supreme Court on February 3, 2010.

In Petitioner's Cross-Petition, among the strictly state issues argued, Petitioner questioned the Appellate Court's conclusion that a successor judge need not review any portion of the pre-trial record of a case because, "portions of the record not admitted in evidence at trial had no evidentiary value unless they were the proper subject of judicial notice" (Opinion, App. 7 ¶10).[6] Additionally, Petitioner took issue with the Appellate Court's endorsement of Judge Brnovich's hearing the case and deciding witness credibility based solely upon watching the video recordings of the trial proceedings. Finally, Petitioner questioned the constitutionality of the amended form of Arizona Rule of Family Law Procedure 88. The Arizona Supreme Court denied discretionary review of the case on May 20, 2010 (App. 60). This Petition for a Writ of Certiorari follows.

(ii) Statement of Facts

Petitioner's dissolution of marriage action was taken over by a successor judicial officer after the

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[6] The Court further stated regarding review of the record by Judge Brnovich,

> "The holding in *Kells* [*In re Marriage of Kells*, 182 Ariz. 480, 483, 897 P.2d 1366, 1369 (App. 1995)] that the court was constrained to decide a case based on the evidence adduced at trial and facts subject to judicial notice identifies the portion of the record relevant to deciding contested issues tried to the court. This principle holds true whether a case is tried by one judge or two." (App, 8 at fn. 6).

sudden and unexpected resignation of the trial judge. The courtroom proceedings in the case were recorded by a video recording system[7] in lieu of a court reporter as has become standard for family court actions in the Maricopa County Superior Court. The video recording of court proceedings, in Maricopa County courts has become so common that the presence of a court reporter in family court is remarkable.[8] If a transcript is ever needed of court proceedings parties are responsible for arranging to have it produced by a certified private firm based upon the recordings of the proceedings supplied by the county court. These recording are meant to replace a court reporter, and as a transcript of the proceedings could be prepared if necessary, no objection was made to the trial proceedings being recorded in Petitioner's case.

Prior to the January 2008 amendment, Rule 88 of the Rules of Family Law Procedure read exactly as its civil counterpart, Rule 63 of the Arizona Rules of Civil Procedure; which save for a few slight changes in

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[7] The trial recordings are produced and managed by a proprietary video recording/playback system known as For the Record. The Superior and Appellate Courts refer to both the system and the video recordings themselves as "FTR", as Petitioner does in this Petition.

[8] Trial Transcript 1, 7/10/2007 p. 2, Judge Gregory Martin commenting on the presence of a Computer Assisted Real-Time Transcription operator in the courtroom (as an Americans with Disabilities Act accommodation), "Now I do have a reporter. So I was going to ask you – I haven't had a reporter for the last two years. How often do we need to take breaks for you?"

wording is the same as the federal rule it is modeled on, Federal Rule of Civil Procedure 63.

As neither the federal nor state rules have ever been interpreted as allowing for successor judges to hear cases, determine witness' credibility and decide a case based solely upon viewing recordings of trial proceedings, it could not have been anticipated by Petitioner or his attorney that memorializing the trial via video recording rather than a court reporter could be harmful to Petitioner's interests – more so as there was no indication that Judge Martin would abruptly resign after the close of trial.

Effective January 1, 2008, Arizona Rule of Family Law Procedure 88 was amended in a manner which substantially changed the right of parties of family law actions to have their case decided by the judge who tried the case and determined the credibility of the witnesses.

In their ruling Division One of the Arizona Court of Appeals has stated, without reference to which version of Rule 88 applied in the case,[9] that a

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[9] Petitioner's case was taken over by Judge Brnovich on November 20, 2007, while the earlier version of Rule 88 was in effect. Judge Brnovich's Decree was filed with the Clerk of the Maricopa County Superior Court on January 10, 2008, after the amended version of Rule 88 went into effect. In its Opinion, the Court did not address which version of Rule 88 governed, stating, "[w]e need not decide which version of Rule 88 applied in this case, however, as the sentence [the nine words added to the Rule, see Section III, *infra*] was never triggered by a request to recall witnesses." (App. 5 at fn. 4).

successor judge may "hear" a case in its entirety by viewing video recordings of the trial proceedings (Opinion, App. 12 at ¶16). No other court rule regarding successor judges (judicial officers) permits, or has been interpreted to permit, a successor judge to hear a trial, determine witness credibility and decide the action, absent the stipulation of all parties.

REASONS FOR GRANTING THIS PETITION

THE WRIT SHOULD BE GRANTED TO CLARIFY THE RESPONSIBILITIES OF SUCCESSOR JUDGES TO PROTECT THE DUE PROCESS RIGHTS OF LITIGANTS WHEN A TRIAL JUDGE IS REPLACED.

The manner in which Petitioner's divorce case was taken over and decided by the successor judge (for clarity and convenience, Petitioner refers to "successor judge[s]", though the text of amended Rule 88 refers to "judicial officer[s]"), Susan M. Brnovich, deprived Petitioner of his right to due process. Petitioner contends that Judge Brnovich hearing and deciding the divorce case based upon viewing the video recordings of trial deprived him of a meaningful opportunity to be heard on the issues of the case as Judge Brnovich lacked any familiarity with the case and was not in a position to judge the credibility of the witnesses who testified, as she said she did, App. 39, 44-45.

I. No support may be found for the Arizona Court of Appeals' premise that a successor judge may "hear" a case, determine witness credibility, and decide the action by watching a video of the trial. The Appellate Court's decision results in a substantial restriction of the right to due process.

In preface, it should be noted that there is no dispute as to the fact that Judge Brnovich *heard* the trial proceedings in this case by viewing digital video recordings of the five trial sessions overseen by her predecessor, Judge Gregory Martin.[10] Judge Brnovich stated that she heard the case by viewing the "FTR" recordings of the trial proceedings (Decree, at App. 42), and both Petitioner and Ms. Gersten have accepted this in the briefs filed in the Arizona Court of Appeals,[11] as did the Appellate Court in their Opinion (App. 7 at ¶9).

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[10] Judge Brnovich failed to review the recording of the October 1, 2007, contempt hearing of Ms. Gersten or the many discovery/disclosure motions Petitioner brought, App. 10 ¶13. The Appellate Court found that Judge Brnovich was therefore not in a position to deny Petitioner's claim for trial court attorney's fees and costs, and remanded this issue to the trial court.

[11] Petitioner's Opening Brief, p. 6-7; Ms. Gersten's Answering/Opening Brief at p. 12-13.

While Petitioner has generally accepted that Judge Brnovich reviewed the FTR recordings of the five trial sessions, because of substantial factual errors regarding the Court's mischaracterizations of witness' testimony as identified in Petitioner's appellate briefs, Petitioner believes it possible that Judge Brnovich's viewing of these recordings may not always

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1. On reading the Opinion and Memorandum Decision of the Arizona Court of Appeals, the most striking aspect of the Court's judgment may not at first be obvious, though in sitting with and carefully considering the Court's decision something does seem absent. Missing from the Court's judgment is any explanation, justification or citation to prior cases or law, which would support their conclusion that a case may be decided by a successor judicial officer based solely on a viewing of video recordings of trial.

That the Court's judgment would be so lacking is understandable considering that all prior case law is at odds with this decision. But it should not be assumed that this decision is an anomaly, rather it is a necessary consequence of the changes made by the Arizona Supreme Court in recently amending Arizona Rule of Family Law Procedure 88 (section III, *infra*). Therefore, while this is a first of its kind decision,[12] it

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have been at a normal playback speed. The five trial settings Judge Brnovich stated that she reviewed total 12.3 hours. In viewing electronic recordings of a trial, a successor judge has at their command fast forward and playback controls, which a presiding trial judge may wish for but does not possess. There is no reason to believe that Judge Brnovich being familiar with the controls of the FTR system would not avail herself of its capabilities in this regard (*see* Section I – 3, *infra*).

[12] The Appellate Court's Opinion is at odds with prior decisions of the courts of Arizona, *Davis v. Davis*, 195 Ariz. 158, 985 P.2d 643 at ¶24-25 (Ariz.App. 1999) (holding that a successor judge may not "hear" a trial by reviewing the transcript); *Daru v. Martin*, 89 Ariz. 373, 363 P.2d 61 (Ariz. 1961) (finding a successor judge is not in a "position to pass on the credibility of

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should not be assumed that the situation will correct itself within the Arizona courts; the Arizona Supreme Court, presented an opportunity to review this case, the first that implements the amended form of Rule 88, declined to review this matter. If the Appellate Court's interpretation of the amended rule were so aberrant, so divergent from the Supreme Court's intent in promulgating it, then surely the Court would have taken this first opportunity to clarify the Rule and make its intended application known. As this did not happen, it must be assumed that the Court of Appeals' reading of the amended Rule is in conformity with the Supreme Court's intent in promulgating it.

Regardless of the amended Rule, no support may be found for a successor judge proceeding to determine witness credibility when the successor judge has not personally observed the witness' testimony, *Cede & Co. v. Technicolor, Inc.*, 758 A.2d 485 (Del.Supr. 2000) at 491. As this Court has stated many times, the findings of a trial court are due great deference, *Anderson v. City of Bessemer*, 470 U.S. 564 (1985) at 573-575. No small part of this deference is because the trial judge is actually present during the trying of a case, the presentation of evidence and the

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witnesses whom he has not seen."); and with the holdings of the reviewing court's of other states, *In re Marriage of Seyler*, 559 N.W.2d 7 (Iowa 1997).

testimony of the witnesses.[13] Thus a trial judge is usually in a far better position to ascertain the facts of the case, and their judgment as to the facts should not be disturbed absent a showing that those findings are "clearly erroneous", *Anderson v. City of Bessemer*, at 573-581, ("[t]he task of appellate tribunals generally – is more limited still: we must determine whether the trial judge's conclusions are clearly erroneous").

2. In the present case though, it must be asked how Judge Brnovich was in a better position to make findings of fact or determine witness credibility than a reviewing state court, or indeed in a better position than this Court? As recently held by the Second District of the Florida Court of Appeals,

> " . . . a successor judge's ruling is afforded less deference on appeal than that of a presiding judge. This is because a presiding trial judge is in a much better position to make such a ruling given that the presiding trial judge witnessed the trial firsthand. In fact, a successor judge is in no better a position than the appellate court to make such a ruling. . . . In reviewing a successor judge's ruling in such a situation, the appellate court engages in a review that is more in the nature of a de novo review." (internal citations omitted)

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[13] *See also Wainwright v. Witt*, 469 U.S. 412 (1985) at 428-429; *cf. Bose Corp. v. Consumer Union*, 466 U.S. 485 (1984) at 498-501.

Sullivan v. Kanarek, 34 So.3d 808, 35 (Fla. 2nd DCA 2010) *Id.* at 812-813.[14]

In this instance, the Arizona Court of Appeals was presented the exact same information and materials as Judge Brnovich. The Appellate Court was in no better and no worse a position to ascertain the facts of the case and pass judgment on the credibility of the witnesses as Judge Brnovich was. The Appellate Court abdicates its responsibilities, for the sake of convenience, in stating, "[o]ur review of the FTR recordings revealed that the quality of the recordings supported Judge Brnovich's finding that she was able to adequately hear the testimony and view the witnesses. We do not detect error." (footnote omitted), App. 12-13. The Court was possessed of all the material necessary to determine *de novo* the facts of this case and to determine whether the credibility determinations made by Judge Brnovich could actually have been made from the FTR recordings available. Being possessed of this material, for the Court to defer to Judge Brnovich merely because she is a judge of the Superior Court is to put form over substance and in so doing to do injustice to the parties of the case.

3. As Petitioner first challenged in his Reply Re: Motion for New Trial (*Id.* at p. 2 ¶2-4), the audio quality of the FTR recordings of trial in this case

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[14] *See also Bankcard America, Inc. v. Universal Bancard Systems, Inc.*, 203 F.3d 477 (7th Cir. 2000) at 481.

were lacking.[15] Judge Brnovich's response, in denying Petitioner's Motion for New Trial was, "[i]n Petitioner's Reply, he notes that the sound quality of the recording goes down as the parties step away from the microphones. Although this is true, adjustments can be made to the volume through the FTR program. As the Court did this, there was no problem hearing anything that was said during trial while the trier of fact was on the bench." (Order, App. 39). In their Opinion the Appellate Court also acknowledged the limitations of the FTR system, but with regard to Judge Brnovich's use of it and the "adjustments" she could make stated that, "[t]he record before us does not provide any reason to disbelieve Judge Brnovich in the assessment of her ability to view and hear the FTR recordings." (App. 12, ¶16).

A successor judge's ability to fiddle with computer controls in an attempt to hear a trial does not adequately protect the right to due process. If a successor judge cannot hear the recordings without resorting to "adjustments", then the recordings must be seen as prima facie inadequate to the role the court would use them in. Further, the various "tweaks" that may be used to allow one to hear the

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[15] As stated by Judge Martin at trial, unless the speaker was speaking directly into a microphone, the FTR system would not pick-up their speech, TR 5, 10/17/2007 p. 416.

recordings, of themself will change the nature of the recordings that the successor judge would review.[16]

The video produced by the FTR system is similarly flawed, producing images that prove inadequate to clearly viewing the witness giving testimony. This is especially true if the viewer intends to make credibility determinations of the witness' testimony based upon these video recordings. The FTR recordings used by Judge Brnovich, and so trusted by the Appellate Court, did not provide close-ups of the witnesses. Rather, the video provided a type of wide-shot of one section of the courtroom (of Respondent's table and the surrounding area for instance) or at best a long-shot of the witness on the stand (taken from a camera positioned some thirty feet away). From this manner of video, the successor judge and the Appellate Court believe accurate credibility determinations may be drawn. In so overestimating the abilities of successor judges, the Court of Appeals permits a successor judge to employ a procedure that will invariably lead to incorrect and unjust results. Petitioner would ask that the Court not necessarily accept his characterization of the FTR recordings, but instead would invite the Court to review the recordings themselves, as Petitioner invited the Arizona Court of Appeals. The Appellate Court declined this invitation (Opinion,

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[16] Increasing the bass, adjusting the treble, fiddling with the pitch may allow unclear testimony to be heard, but these changes alter how witnesses sound and may affect how the Court perceives their testimony.

App. 13 at fn. 7) and in so doing, denied themselves the opportunity to make a fair assessment of the quality and reliability of the recordings for the use they are put to by successor judges.

To decide a case without *actually* hearing from the witnesses and accessing their demeanor and tone of voice, without noting the readiness or hesitancy of responses, without observing the interplay between attorneys and witness, is to deprive a court of the knowledge necessary to pass judgment on the credibility of the witnesses, thus calling into question the court's findings. No matter how accurate a court may believe the recordings of trial may be, the fidelity of a recording will always pale in comparison to the real thing. When, as here, witnesses are available to be recalled, a court's reliance upon recorded testimony to divine the truthfulness of a witness' testimony results in the deprivation of due process.

In sum, a successor judge's use of video recordings to hear and decide an action, including among the court's tasks the weighing of evidence and determinations of witness' credibility, will produce necessarily flawed results. These flaws, inherent in the procedure, must be seen as violations of a party's right to due process. If a court is to decide an action, then the court must permit all parties a meaningful right to be heard on the issues including the right to produce witnesses in support of their case. And for this hearing to be meaningful, it must be before the judge who will actually decide the matter.

II. The Appellate Court's decision that a successor judge need not review any part of the pre-trial record in a case before ruling denies parties' their right to due process.

Again, in preface it should be noted by the Court that there is no dispute as to the parts of the record[17] that were reviewed by Judge Brnovich in proceeding with the case under Arizona Rule of Family Law Procedure 88.[18] Judge Brnovich stated what material she reviewed before entering the Decree of Dissolution of Marriage (Decree at App. 42, *see also* Order denying Motion for New Trial, App. 39), and both Petitioner and Ms. Gersten have accepted that Judge Brnovich reviewed the materials listed in the Decree, and only the material listed.[19]

1. The first and most fundamental of the requirements of Federal Rule of Civil Procedure 63, is

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[17] The term "record" or "the record", unless otherwise indicated, refers to the case record, and with reference to the trial court, the pleadings that were filed in that court.

[18] At the November 20, 2007 Status Conference and in the accompanying Minute Entry (App. 59), as well as in the Decree (App. 43), Judge Brnovich refers to Arizona Rule of Civil Procedure 63 as providing her authority to proceed as a successor judge following Judge Martin's resignation. As identified in Petitioner's appellate pleadings, and as recognized by the Court of Appeals in their Opinion (App. 4), Judge Brnovich actually proceeded pursuant to Rule 88 of the Arizona Rules of Family Law Procedure, the Procedural Rules governing family law actions in Arizona (Rule 1 and 2, ARFLP).

[19] Petitioner's Opening Brief, p. 6-7; Ms. Gersten's Answering/Opening Brief, p. 9.

that a successor judge may not proceed without, "certifying familiarity with the record and determining that the case may be completed without prejudice to the parties." This most basic of protections of due process under the federal rule must apply equally to the states, having derived their local rules in large part from the federal rules.[20] The interpretation of analogous state court rules regarding successor judges should therefore be informed by the actions of the federal courts in interpreting Federal Rule of Civil Procedure 63.

What constitutes the record that a successor judge may need to review has been settled in the federal courts, ("To certify her familiarity with the record, the successor district judge will have to read and consider all relevant portions of the record.") *Canseco v. United States,* 97 F.3d 1224 (9th Cir. 1996) at 1227.[21] The Ninth Circuit's holding necessarily precludes a successor judge from ignoring the pre-trial record in a case merely because it is a *pre-trial* record, as is the case here, where the Appellate Court

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[20] The Rules Committee Comment to Arizona Rule of Family Law Procedure 88 (both pre- and post-amendment versions) states that the Rule is based upon Arizona Rule of Civil Procedure 63. The Committee's Comment to Rule 63, ARCP in turn notes that it is taken from Federal Rule of Civil Procedure 63.

[21] Discounting the decision of the Appellate Court in this case, the question of what constitutes the "record" for a successor judge's review had previously been settled by the courts in Arizona, *Daru v. Martin*, at 64.

decided that the, "portion of the record relevant to deciding contested issues tried to the court" is "the evidence adduced at trial," (Opinion, App. 8, fn. 6).

For a judge to decide a case without having any knowledge of the progress of the case – in a vacuum as to its essential details, the controversies involved, the positions taken by the parties and how those positions may have changed over the course of the action's litigation – is to prejudice the parties and deny them their right to due process. It is accepted that for a court to decide a controversy it must first know the particulars of the dispute. That a successor judge, assuming a case for their predecessor must become familiar with the case is the reason for the first requirement of Federal Rule of Civil Procedure 63,[22] "[i]f a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties." For a successor judge to believe that they need not become familiar with *all* relevant portions of the record of a case before deciding the action is both hubris and folly.

In the present case, Judge Brnovich stated, and the Appellate Court agreed, that a successor judge

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[22] Federal Rule of Civil Procedure 63 is the basis from which most of the state equivalent Rules are taken, Kurtis A. Kemper, Annotation, *Power of Successor or Substituted Judge, in Civil Case, to Render Decision or Enter Judgment on Testimony Heard by Predecessor*, 84 A.L.R. 5th 399 § 2[a] (2000).

need not review the pre-trial record before deciding a case. That the pre-trial record may be disregarded merely because it is the *pre-trial* record and as stated by Judge Brnovich, "[u]nless a document is offered as evidence at trial, the Court cannot consider it," is to ignore the clear wording of the Rule, which commands that in order to proceed a successor judge must first "certify familiarity with the record". As Rule 63/88 serves to safeguard due process in such circumstances, where a successor judge must take over a case, degrading, weakening or in any way, not giving the language and intent of the Rule its full meaning should not be permitted.

This is not to say that a successor judge must review the entirety of the record in a case. As held by various federal circuits, a successor judge need only certify familiarity with those portions of a case's record that are relevant to those tasks the successor judge has assumed (*Canseco v. United States,* at 1227). Where as is the case here, a successor judge is to decide the entirety of an action after the completion of a lengthy bench trial the successor judge may even lessen the enormity of their task by ordering parties to direct the Court to the portions of the record they believe relevant, *Mergentime Corp. v. Washington Metropolitan Area Transit Authority,* 166 F.3d 1257 (D.C. Cir. 1999) at 1265.

As previously stated (fn. 5, *supra*) Judge Brnovich did not even review such basic material as the Petition for Dissolution of Marriage or Ms. Gersten's Response to this Petition. At a most elementary level, the judge

who assumes authority for and renders a final judgment in an action must read the complaint, which initiates legal process and any response thereto. This should be done if for no other reason than to allow the judge to be familiar with the positions and claims made by the parties and to permit the court to understand how those positions and claims may have changed during the course of litigation. This is especially so when the trial court acts as a court of equity in a community property state, such as in Arizona. In the circumstances of the present case, with regard to the division of community property and the assignment of community debt, pursuant to A.R.S. § 25-318(A) & (C), certain financial misconduct by a party, as was alleged here, may be considered in the court's distribution of property. Though how this may be done if the court is not familiar with such basic matters as the complaint and response in an action is impossible to say. It is safe to assume that a court so lacking in fundamental knowledge of the case will necessarily risk error in attempting to divide community property when a claim of financial misconduct is before the court.

All told, in complying with Rule 88's demand that the court, "certify[ ] familiarity with the record," Judge Brnovich reviewed less than two percent of the Superior Court filings that were made before she assumed the case for Judge Martin.

2. Though numerous federal circuit courts have dealt with the issue of successor judges proceeding with and ruling in cases tried by their predecessor,

Petitioner is unaware of any case where this Court has directly addressed this issue.[23] As this issue frequently recurs in both federal and state courts and as it has implications of the most fundamental nature – that the judge deciding an action would have some passing familiarity with it, and that those who are to decide a trial would have actually heard it – the questions that arise when a successor judge proceeds in a case fairly beg for this Court's considered attention.

3. In *Anderson v. City of Bessemer*, 470 U.S. 564 (1985), this Court explained the rationale behind the overwhelming – nearly insurmountable[24] deference paid the findings of trial judges.

As stated by the Second District of the Florida Court of Appeals in *Sullivan v. Kanarek,* the findings of a successor judge are not entitled to the same deference as those of a trial judge who actually presided over the proceedings. Petitioner would submit

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[23] Though the power of a successor judge to sign the orders of their predecessor was addressed by the Court in *Life & Fire Ins. Co. of New York v. Heirs of Wilson,* 33 U.S. 291 (1834).

[24] Regarding the deference paid a trial court's findings, this Court has stated,

> "But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, *can virtually never be clear error.*" (Emphasis added) *Anderson* at 575.

that among the findings that may call for *de novo* review is the successor judge's determination that the judge is able to proceed without prejudice to the parties. With particular attention to this case, Judge Brnovich's finding, "that a final ruling on this case may be made without prejudice to the parties, pursuant to Rule 63 of the Arizona Rules of Civil Procedure," must be seen as at best a well-intentioned guess, as absent review of the record Judge Brnovich assumed rather than determined that no prejudice would occur, *cf. Cede & Co. v. Technicolor, Inc.*, 490-491. For how was Judge Brnovich to know that proceeding in the manner she did would not prejudice the parties. Judge Brnovich lacking knowledge of the record in the case, save for parties' written closing arguments[25] and one pre-trial filing, resulted in the Court guessing that proceeding would not cause prejudice.

In general, it must be assumed that a successor judge would wish to dispose of the cases on their docket as expeditiously as possible, more so when those cases are holdovers from their predecessor.[26]

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[25] A party's closing arguments must be seen as essentially self-serving, attempting to put the best possible face on both the trial proceedings and the record in the case. The closing briefs filed in this case were no different. For a successor judge to assert that reading these closings constituted review of "the record" is to grossly distort the requirements of Rule 88.

[26] It is in a court's financial interests, if nothing else, for a successor judge to proceed without conducting a new trial. Under Federal Rule 63 (or similar state court rules) a successor

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Simply put, when a court makes findings that are in the court's own interests, on appeal those findings warrant critical examination, especially when those findings may jeopardize a party's right to due process.

III. No support may be found for the change to Arizona Rule of Family Law Procedure 88, and the amended Rule violates the due process and privileges or immunities clauses of the Fourteenth Amendment.

As amended Arizona Rule of Family Law Procedure 88 results in two classes of family court litigants. The first class enjoys the right to have their case decided by a judge familiar with the action and who has *heard* from the parties and witnesses. The second, *de facto*, class does not enjoy these rights, and must settle for decidedly less protections. The only difference between the first and second class is that the second class required the replacement of the trial judge with a successor. It should be noted that such replacement is often for the court's own reasons and convenience that have nothing to do with the parties themselves, as was the situation in this case. Separate and aside from all other considerations, at a minimum parties should not be forced to suffer

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judge may only proceed if they are able to *determine* that the proceedings "may be completed without prejudice to the parties." *Cede & Co. v. Technicolor, Inc.*, 490; 12 Moore's § 63.04. Such a determination is in a court's financial interests to make.

deprivation or restrictions of their rights for the convenience of a court or judge.[27]

Petitioner would submit that the creation of a second class of litigants in the family courts of Arizona, who enjoy substantially less protection of the right to due process violates the privileges or immunities clause of the Fourteenth Amendment to the United States Constitution.

1. Prior to January 1, 2008, Arizona Rule of Family Law Procedure 88 mirrored its Civil Rule counterpart. The Rule was changed without explanation as to why such change was necessary or even desirable.[28] What may seem a minor change to the Rule, the addition of nine words, "and if an adequate electronic record is not available," has in fact substantially changed the tenor of the rule and materially altered the due process protections of parties involved in family court proceedings.

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[27] As identified in Petitioner's appellate filings, contrary to the Notes of the Advisory Committee on the December 1991 Amendment to the Federal Rule of Civil Procedure 63, the reasons for Judge Martin's replacement were never stated for the record; 12 Moore's Federal Practice § 63.03.

[28] The Petition which resulted in the January 2008 amendments of the Arizona Rules of Family Law Procedure, filed by the Honorable Norman Davis, Presiding Judge of the Family Court Department of the Maricopa County Superior Court (now Presiding Judge of the Maricopa County Superior Court), while explaining most of the proposed substantive changes to the Rules, contains no explanation as to the proposed changes to Rule 88.

A casual reading of the amended Rule (Constitutional Provisions and Rules Involved, *supra*) may lead one to believe that the changed language only comes into play if a party requests the recall of a "witness whose testimony is material and disputed."[29] In fact, this is not so. The Rule states that the successor judge does not have to recall witnesses, even if requested to do so, if there is an "adequate electronic record" available. This necessarily means that if there is an adequate electronic recording of the proceedings, a successor judge need not recall witnesses and that the judge *may hear the case* by viewing the electronic recordings of the trial, regardless of whether or not the recall of witnesses is requested. In the present case, both parties were taken very much by surprise at Judge Brnovich's announcement at the start of the Status Conference that she intended to rule in the case based upon video recordings of the trial. Nevertheless, Petitioner's attorney presented a thoughtful objection and suggested an alternate procedure,

> MS. UNDERWOOD [Petitioner's attorney]: " . . . Judge Martin was the trier of fact. He basically got a chance to review all the people, look at their demeanor, and he held off a lot of things till the end of the case. Now when I look at the case law here, it says 'a successor judge cannot weigh evidence that

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[29] Division One of the Arizona Court of Appeals is of the belief that the amended form of Rule 88 is only triggered if a party requests the recall of witnesses (Opinion, App. 5 fn. 4).

> was taken before his or her predecessor and decide facts.' * * * Like you could make decisions, if he would at least make a findings of fact and conclusions of law. What we were hoping is that based on what has transpired in this case, that Judge Martin would at least go so far as do the findings of fact and conclusions of law and then allow you to apply that to the case, that way we wouldn't have a problem with it and it would be in conformity with Arizona law. But the way things have transpired, we feel that the clients would be prejudiced by a third party who didn't get a chance to actually make their own objection, look at the rulings for yourself, and make a decision on the case." TR 7, 11/20/2007 p. 586-588

As a result of the unusual and surprising procedure announced by Judge Brnovich, neither side requested the recall of witnesses and the court, over the objection of Petitioner's attorney, proceeded to watch the trial recordings, and rule in the case (TR 7, 11/20/2007 p. 586-589, *see also* App. 58). In their Opinion, the Arizona Court of Appeals endorsed the procedure Judge Brnovich employed as an acceptable course of action for successor judges to follow, without reference to which version of the Rule may permit it. Though, if an "adequate" electronic record is present, the amended version of Rule 88 plainly allows successor judges to hear and decide a case without the recall of witnesses.

2. In Petitioner's appellate briefing, he allowed for the possibility that there may be some method of recording that will prove "adequate" to capturing trial proceedings. Though in this discussion Petitioner's fundamental objection remained[30] and he was unequivocal in his assertion that the FTR recordings were inadequate for the task Judge Brnovich used them for. In attempting to feel out the boundaries of due process, Petitioner hypothesized that it might be possible to create a standard as to an "adequate electronic record"[31] that could be employed by a successor judge to hear a case and at the same time protect due process. In this, Petitioner listed some of the considerations that must be addressed in defining "adequate", which Petitioner emphatically stated that the FTR[32] system used by Judge Brnovich was not. As used by the Maricopa County Superior Court, FTR produces a video image (320 x 240)[33] with less than

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[30] Petitioner's objection to the procedure that Judge Brnovich used, and now permitted by Rule 88, is that due process requires a judge who is to decide an action and determine the credibility of the witnesses actually "hear" the trial in the case they are to decide. Absent such a hearing, or the stipulation of both parties, the successor judge's actions violate the due process guarantees of the Fourteenth Amendment.

[31] The language of the amended Rule is vague and ambiguous in specifying the use of an "adequate electronic record"

[32] It is perhaps noteworthy, considering the Maricopa County Superior Courts extensive adoption of the FTR system, that the United States sales office of FTR is located in Phoenix.

[33] As viewed within Windows Media Player (.wmv format). In violation of the "standards", Ariz. Code of Jud. Admin. § 1-602(C)(3)(c), cited by the Appellate Court in their Opinion (App.

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half the resolution of VHS videotape (330 x 480). The video being captured is from fixed cameras, with the camera that is focused on the witness stand positioned some thirty feet from the stand (producing a "long shot" of the witness rather than a close-up which would allow facial expressions to be seen). Furthermore, the video of trial proceedings jumps among the various cameras in the courtroom, often preventing the viewer from seeing who is speaking at any given time.

As the Appellate Court declined to address Petitioner's objections, the question remains whether any mode of recording will capture all that is necessary for a successor judge to experience a trial as though they are actually there? As any theater or concertgoer will attest, a live performance, in innumerable ways is unique upon itself and resistant to ready reproduction. Why then should the subtleties and uniqueness of the live performance of a courtroom be any easier to capture and convey to a successor judge? Hearing and deciding a case is a manifold endeavor which

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13, fn. 8) the Maricopa County Superior Court makes use of the FTR system, which creates recording only viewable with an FTR "player". FTR makes players only for the Windows® operating system. Individuals who use other operating systems, as Petitioner does, have to arrange with the Court's Electronic Records Services, a tedious process, to obtain the FTR recordings in a non-proprietary format (.wmv) so that they may be viewed on a non-Windows computer. The normal display size of these recordings in Windows Media Player is a miniscule 3 inches by 4 inches; enlarging the video merely creates a larger fuzzy image.

requires, for a number of reasons, that a judge actually hear the case, and not merely watch a recording of it. In the embrace of new technologies, the courts cannot permit eagerness to trump the principles of due process.

3. If the right to due process is derived by virtue of national citizenship, as by the clear language of the Fourteenth Amendment it appears to be, then additional or special limitations that a state may impose upon this right with respect to some but not all citizens, conflicts with the privileges or immunities clause of the Fourteenth Amendment.[34] The nature of the change to Rule 88 is that it only applies to parties in family law cases where the original trial judge must be replaced. Thus, the limitations the Arizona courts make upon the right to due process in implementing the revised Rule are forced upon some, but not all family court litigants. In Arizona, if the trial judge is not replaced, family court litigants continue to enjoy the right to have their case decided by the individual who actually heard the case. Further, litigants in family law cases tried in other states continue to enjoy the full protections the right to due process has traditionally provided.

For the Arizona Supreme Court to substantially curtail the right to due process of certain family law

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[34] Separate concurring Opinion of Justice Thomas, *McDonald v. Chicago*, 561 U.S. ___ (2010) (Thomas, J., concurring in part and concurring in judgment).

litigants for circumstances, as in the present case, which could not have been anticipated and are beyond the control of the parties, is to do a great injustice. As this Rule only pertains to the family courts of Arizona, the risks that this deprivation of due process will adversely affect the often innocent bystanders to family law actions, children, is indeed high. There is also the likelihood that acceptance of the Rule in the family court may lead to its adoption in other divisions of the Superior Court. More prevalent use of the Rule to "hear" and decide cases will surely undermine confidence in the judiciary.

The amended Rule warrants this Courts examination to determine if the privileges of United States citizens, resident of Arizona, are being unjustly circumscribed by the Arizona Rules of Family Law Procedure.

4. It has been said that this Court prefers to consider cases that are not messy or muddled; cases in which the issues presented may be addressed without very many factual controversies having to be addressed. Admittedly, Petitioner's case in the trial court was messy. Though, the same is true of many family law actions. It is inherent that a contested family law case[35] will be to a certain extent messy. If

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[35] At present the only type of case in Arizona that may be heard and decided by a successor judge's review of electronic recordings of trial are those cases governed by the Rules of Family Law Procedure. The only cases where a successor judge deciding on witness' credibility in such a manner may constitute

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this Court is ever to examine the amended Rule, it will have to be in such a case. The advantage of the present action as a vehicle for the Court to evaluate Rule 88 is that all that is in jeopardy is property. If Rule 88 is permitted to remain unchallenged or examined by this Court, the next case to reach the Court may very well involve custody decisions made by a successor judge, based on watching video recordings of the trial overseen by their predecessor. It would be a very sad situation indeed for such a case to be the test by which this Court examines Rule 88. Years could pass while such a case progresses through the appellate process before the matter could be petitioned to this Court;[36] during which time the custody decision would be permitted to stand – perhaps erroneously – with attendant consequences for the families and children involved.

Children are not normally parties to the family court actions their parents are involved in, nor are they usually represented in these actions.

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a prejudicial violation of a party's right to due process would be in cases where the facts and witness' testimony are disputed.

[36] *See In re Marriage of Seyler* (Iowa 1997) *Id.* at 12,

> "This case, however, involves the issue of child custody, the resolution of which depends on a dynamic situation. By the time this case arrives back in district court, nearly two years will have elapsed since the trial. The relative suitability of the parents to care for their child may have changed significantly in this time period."

See also Armstrong v. Manzo, 380 U.S. 545 (1965).

Consequently, their lives, welfare and future are decided with little protection or regard for their right to due process.[37] That Arizona now permits these decisions to be made by a judge who has not actually heard the testimony of witnesses only increases the chance that children will be adversely affected by the court proceedings of their parents.

While it is unlikely that any family law case will be the ideal vehicle for posing a constitutional question to this Court, it is preferable that the petition not involve such serious and far-reaching an issue as custody of minor children. For this reason, this action, with all of its attendant problems, is in fact the best opportunity for this Court to examine and address the changes recently made to Rule 88 by the Arizona Supreme Court, and the due process questions which arise from it.

THE MERITS OF THE CASE

It is difficult to assess the merits of Petitioner's case separate and apart from the legal errors committed by the trial and appellate courts. It is easy to claim that the trial court would have ruled differently on the various claims presented it if the successor

[37] To be sure, neither a child's life nor property will be affected by a family court's decision, a minor child's liberty (of a fashion) is most assuredly at stake in the family court's custody decisions.

judge were familiar with the record in the case and had personally heard from the witnesses; though, this contention is difficult, if not impossible to prove. A witness' testimony, if not self-contradictory, may reasonably be seen as credible by one judge and as dishonest by another and on appeal a trial court's credibility determinations are nearly impossible to rebut, *Anderson* at 575. Petitioner will not be so presumptuous as to assert that another judge *actually hearing* the same testimony would not have made the same credibility determinations that were made by Judge Brnovich. Just the same, a judge possessing familiarity with *all* relevant portions of the record in the case would have used that knowledge to inform how they heard the testimony of the witnesses.

CONCLUSION

This case raises questions regarding the due process rights of litigants in Arizona family courts. While the case in the courts below had many factual controversies and questions regarding witness' credibility, the case and questions presented this Court are devoid of such complications. This case, with only property at stake, presents the Court an early opportunity to examine the amended form of Arizona Rule of Family Law Procedure 88 and determine whether its use by successor judges may result in violations of the right to due process.

For the reasons stated, the Court should grant this Petition.

Respectfully submitted,

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In Propria Persona

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	No. 1 CA-CV 08-0392
CHARLES GERSTEN,	DEPARTMENT B
Petitioner/Appellee/ Cross-Appellant.	**OPINION**
v.	(Filed Nov. 17, 2009)
ETHEL JOYCE GERSTEN,	
Respondent/Appellant/ Cross-Appellee,	

Appeal from the Superior Court in Maricopa County

Cause No. FN2005-051436

The Honorable Susan M. Brnovich, Judge

AFFIRMED IN PART,
REVERSED IN PART AND REMANDED

Charles Gersten — Phoenix
In *propria persona*

The Harian Law Firm PLC — Glendale
By Julius Harms
Attorney for Respondent/Appellant

TIMMER, Chief Judge

¶1 This appeal and cross-appeal from a decree of dissolution require us to resolve a myriad of issues

relating to a successor judge's role in ruling on contested issues tried before another judge, property distribution, and a request for support of a disabled adult. For the reasons that follow and in a companion unpublished memorandum decision, we affirm in part and reverse and remand in part.

BACKGROUND

¶2 Ethel Gersten ("Wife") and Charles Gersten ("Husband") married in November 1975 and had two children. Husband became disabled shortly after the marriage while working as a United States postal employee. Thereafter, he received workers' compensation benefits pursuant to the Federal Employees' Compensation Act ("FECA"), 5 United States Code ("U.S.C.") section 8101 et seq. (2006). Wife worked as a teacher during the marriage and took early retirement in 2005.

¶3 The parties separated in July 2002. In October 2005, Husband filed a petition for dissolution of the marriage. The family court, through Judge Gregory H. Martin, conducted a trial on five non-consecutive days commencing July 10, 2007 and ending October 18, 2007, in which it considered contested issues concerning property and debt allocations and the propriety of family support. In lieu of using a court reporter to report the proceedings, the court used a digital video recording system known as "For the Record" ("FTR"). At the conclusion of the evidence, Judge Martin ordered the parties to submit written

closing arguments by November 8, and they did so. Thereafter, the court took the matter under advisement.

¶4 Before ruling on the petition, Judge Martin resigned from the court, and Judge Susan M. Brnovich replaced him.[1] At a status conference held on November 20, Judge Brnovich informed the parties she planned to review the FTR recording of the trial and, unless the recording was problematic, thereafter rule on the merits of the petition. Husband objected, contending a successor judge cannot assess witness credibility and is therefore prohibited from weighing evidence introduced before the original judge and then deciding facts. He suggested that Judge Martin enter findings of fact and conclusions of law and then Judge Brnovich could apply those findings to the case. Judge Brnovich rejected Husband's position, noting the applicable court rules of procedure permitted her to proceed as she suggested. According to the judge, because the proceedings were video recorded, she would be able to evaluate the demeanor of the witnesses.

¶5 On January 10, 2008, Judge Brnovich entered a decree dissolving the parties' marriage and distributing their assets. After the court denied Husband's

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[1] At the time, Judge Brnovich was a commissioner serving as a judge *pro tempore*. The Governor of Arizona has since appointed her as a judge.

motion for new trial, Wife initiated this appeal and Husband filed a cross-appeal.[2]

DISCUSSION

I. Compliance with Rule 88

¶6 Husband first argues the family court erred by denying his motion for new trial because Judge Brnovich failed to comply with Arizona Rule of Family Law Procedure ("Rule") 88 in multiple ways before ruling on his petition.[3] Rule 88 provides as follows:

> If a trial or hearing has been commenced and the judicial officer is unable to proceed, any other judicial officer may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to

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[2] By separate unpublished decision filed this date, we address a jurisdictional issue, Wife's appeal, and additional issues raised in Husband's cross-appeal. These issues are not relevant to our analysis in this opinion and do not meet the standards of publication set forth in Arizona Rule of Civil Appellate Procedure ("ARCAP") 28(b).

[3] Curiously, Husband also contends Judge Brnovich erred by failing to follow a different procedure outlined in *Chiricahua Ranches Co. v. State*, 44 Ariz. 559, 39 P.2d 640 (1934), and *Daru v. Martin*, 89 Ariz. 373, 363 P.2d 61 (1961), for successor judges faced with a motion for new trial. *Chiricahua Ranches*, however, has been superseded by the 1996 promulgation of the current version of Arizona Rule of Civil Procedure 63, which substantially mirrors Rule 88. *See Davis v. Davis*, 195 Ariz. 158, 162-63, ¶¶ 17-19, 985 P.2d 643, 647-48 (App. 1999).

> the parties. At the request of a party and if an adequate electronic record is not available, the successor judicial officer shall recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judicial officer may also recall any other witness.[4]

Husband contends the court violated Rule 88 by (1) failing to certify familiarity with the entire court record, (2) failing to permit the parties an opportunity to ask for witnesses to be recalled to testify, and (3) relying on an inadequate digital recording of the trial proceedings before Judge Martin. We review the court's denial of the motion for new trial for an abuse of discretion. *Harris v. Harris,* 195 Ariz. 559, 561, ¶ 6, 991 P.2d 262, 264 (App. 1999).

A. Certification

¶7 Both parties contend Rule 88 only requires a successor judge to review items in the record that are relevant to the outstanding issues, and we agree. No purpose would be served by requiring a judge to

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[4] At the time Judge Brnovich informed the parties on November 20, 2007, that she intended to review the FTR recordings, the second sentence in Rule 88 did not refer to the availability of an adequate electronic record. By the time Judge Brnovich entered the dissolution decree on January 10, 2008, however, the current version of Rule 88 had become effective. We need not decide which version of Rule 88 applied in this case, however, as the sentence was never triggered by a request to recall witnesses. *See infra* ¶ 14.

review portions of the record irrelevant to the pending trial or hearing. *See State v. Old W. Bonding Co.*, 203 Ariz. 468, 472, ¶ 16, 56 P.3d 42, 46 (App. 2002) (stating court should interpret court rule to give it a fair and sensible meaning); *see also Mergentime Corp. v. Washington Metro. Area Transit Auth.*, 166 F.3d 1257, 1265 (D.C. Cir. 1999) (interpreting federal counterpart to Rule 88 and deciding "successor judges need only certify their familiarity with those portions of the record that relate to the issues before them"); *Canseco v. United States*, 97 F.3d 1224, 1227 (9th Cir. 1996) (to same effect). The parties disagree, however, about what items in the record were relevant to Judge Brnovich's rulings. Husband asserts that because Judge Martin never made factual findings, Judge Brnovich was obligated to review the entire pre-trial record in chronological order before reviewing the FTR recordings in order to "step into the shoes" of Judge Martin and make credibility determinations. Wife responds that Judge Brnovich properly reviewed the portion of the record relevant to the trial rather than the entire record.

¶8 We agree with the *Mergentime* court that "the extent of the certification obligation depends upon the nature of the successor judge's role in a given case." 166 F.3d at 1265. Thus, a successor judge who steps in mid-trial may need to be familiar with the entire record in order to gain sufficient context to make evidentiary rulings, while a successor judge who inherits a case post-verdict may need to consider a narrower range of items related only to post-trial

motions. *Id.* The key consideration for the successor judge in deciding what to review is the relevancy of the items to pending matters.[5] *See id.*; *Canseco*, 97 F.3d at 1227.

¶9 In this case, Judge Brnovich assumed responsibility for ruling on the petition after the close of evidence and submission of closing arguments. With one exception, Judge Martin made all evidentiary rulings during the trial. Thus, Judge Brnovich was required to review all portions of the record relevant to a ruling on the contested issues related to the petition for dissolution of the marriage. She reviewed the trial exhibits, the FTR recordings for the entire trial, the written closing arguments, and Husband's proposed findings of fact and conclusions of law. In response to Husband's argument in his motion for new trial that the judge erred by failing to review the entire record, Judge Brnovich stated she had adhered to "a basic rule related to trial proceedings [ ] that the Court can only consider evidence and arguments presented at trial."

¶10 We agree with Wife that Judge Brnovich reviewed only portions of the record relevant to a ruling on the contested issues at trial regarding property

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[5] In *Mergentime*, the successor judge asked the parties to identify items in a large record that were material to the pending ruling. 166 F.3d at 1265. Although Rule 88 does not require this procedure, a successor judge reasonably could take this approach in order to ensure an efficient and sufficient review of the record.

and debt allocation and the propriety of family support. Absent agreement of the parties, portions of the record not admitted in evidence at trial had no evidentiary value unless they were the proper subject of judicial notice. *In re Marriage of Kells,* 182 Ariz. 480, 483, 897 P.2d 1366, 1369 (App. 1995) (holding financial affidavit filed pre-trial but not admitted in evidence had no evidentiary value at trial absent agreement and court could take judicial notice of the fact a party had filed the affidavit but not the truth of its assertions);[6] Ariz. R. Evid. 201 (limiting judicially noticed facts to those "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). Husband does not identify any portion of the pre-trial record that relates to the contested property and support issues and falls within this category. Consequently, Judge Brnovich did not err by solely relying on the trial exhibits, FTR recordings and post-trial filings to resolve these issues.

¶11 Husband additionally argues that Judge Brnovich needed to certify familiarity with the entire

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[6] Husband argues *Kells* is inapplicable because it did not involve Rule 88. Husband misses the point. The holding in *Kells* that the court was constrained to decide a case based on the evidence adduced at trial and facts subject to judicial notice identifies the portion of the record relevant to deciding contested issues tried to the court. This principle holds true whether a case is tried by one judge or two.

record in order to rule on an outstanding evidentiary issue. Wife sought to introduce in evidence exhibit 68, a list of guns owned by the parties together with their descriptions and values. Husband objected on the basis of hearsay, and Judge Martin initially sustained the objection but later reconsidered the matter, taking it under advisement. Judge Brnovich thereafter reviewed the testimony regarding exhibit 68, overruled the objection, and admitted the exhibit in evidence. Husband does not challenge this ruling on appeal, but asserts the judge needed to review the entire record before ruling on the objection. He relies on *Mergentime*, which stated a successor judge who steps in prior to the conclusion of a trial must be familiar with the entire record in order to make evidentiary rulings. 166 F.3d at 1265.

¶12 We are not persuaded that Judge Brnovich needed to review the entire record in order to make a single evidentiary ruling. As the *Mergentime* court noted, a judge who steps in during trial must be prepared to rule on unknown evidentiary issues, thereby justifying a need to review the entire record for context. *Id.* Conversely, a judge who steps in after the close of evidence must prepare herself to rule only on known evidentiary issues. In that situation, the judge must only certify familiarity with the portions of the record relevant to that ruling. In the present case, Husband does not identify any items in the pretrial record that Judge Brnovich needed to review in order to rule on the admissibility of exhibit 68 Moreover, the FTR recordings contained extensive

argument regarding the admissibility of the exhibit as a compilation. Thus, we cannot say Judge Brnovich erred by failing to review portions of the pre-trial record before ruling on the admissibility of exhibit 68 or that any such error harmed Husband. *See Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, 91, ¶¶ 30-34, 977 P.2d 807, 813 (App. 1998) (noting error not cause for reversal absent showing of harm).

¶13 We agree with Husband, however, that Judge Brnovich erred by failing to review pre-trial portions of the record before ruling on the propriety of an attorneys' fee award pursuant to Arizona Revised Statutes ("A.R.S.") § 25-324 (Supp. 2008). That statute authorizes an award of fees after the court considers the parties' financial resources and "the reasonableness of the positions each party has taken throughout the proceedings." A.R.S. § 25-324(A). In denying the motion for new trial, Judge Brnovich stated her "assessment of whether to award attorney fees was based on the arguments raised at trial and the Court's assessment of the parties' credibility at trial." As Husband points out, this litigation was hotly contested and Judge Martin considered and ruled upon allegations that Wife had committed discovery and disclosure violations. For example, Judge Martin held a hearing between trial days and ordered Wife to disclose more information about her assets and financial resources. Judge Brnovich did not review that proceeding or other pre-trial rulings regarding discovery and disclosure issues. As a result, the judge was not in a position to assess the

reasonableness of the parties' positions taken "throughout the proceedings." We therefore reverse that portion of the decree declining to award attorneys' fees and remand for reconsideration of Husband's request. In doing so, the court must familiarize itself with that portion of the record necessary to permit it to assess the reasonableness of the parties' positions taken throughout the case. Thereafter, the court should comply with the certification requirements of Rule 88 with respect to that issue.

B. Recall of witnesses

¶14 Husband next contends Judge Brnovich erred by failing to recall available witnesses pursuant to Rule 88. Husband acknowledges that neither party asked the judge to recall witnesses. Nevertheless, he argues Judge Brnovich violated the "intent" of Rule 88 by abruptly ending the November 20, 2007 telephonic status conference before Husband could make such a request. We reject this contention. Even assuming Husband felt constrained from making a request to recall witnesses during the status conference, nothing prevented him from subsequently filing a request. Indeed, more than a month passed from the status conference until the court ruled on the petition, permitting him sufficient time to make a request. Judge Brnovich did not err by failing to recall witnesses.

C. Adequacy of FTR recordings

¶15 Husband asserts Judge Brnovich erred by failing to recall witnesses sua sponte because the FTR recordings were too poor to allow the judge to make credibility determinations. Specifically, he complains the FTR recordings produced a small picture, the quality of the audio and sound recordings was poor, and the video "jump[ed]" among cameras, leaving gaps in viewing witnesses. As support for his contention, Husband points out that the written transcript of the proceedings includes a number of places at which words in the recordings are said to be "indiscernible."

¶16 Despite the gaps in portions of the transcripts, Judge Brnovich stated in the decree that she "had no problems with any of the FTR recordings and was able to hear and see all of the testimony." As a result, she found she could rule on the case without prejudice to either party. In denying the motion for new trial, the judge acknowledged that the quality of the FTR recording diminished when the parties stepped away from the microphones but maintained she was able to make adjustments to the volume through the FTR program. As a result, she experienced "no problem hearing anything that was said during trial while the trier of fact was on the bench." The record before us does not provide any reason to disbelieve Judge Brnovich in the assessment of her ability to view and hear the FTR recordings. Our review of the FTR

recordings[7] revealed that the quality of the recordings supported Judge Brnovich's finding that she was able to adequately hear the testimony and view the witnesses. We do not detect error.[8]

II. Property division

¶17 Husband argues the family court erred by allocating to Wife a portion of his extensive firearms collection purchased during the marriage. Specifically, he contends that because he purchased the firearms with his FECA proceeds, and those proceeds were his sole and separate property, the firearms were not community assets subject to division. We review the court's characterization of the firearms as community property de novo as an issue of law. *In re Marriage of Pownall*, 197 Ariz. 577, 581, ¶ 15, 5 P.3d 911, 915 (App. 2000).

¶18 The family court ruled that Husband's FECA income was community property during the marriage,

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[7] The FTR recordings are not official transcriptions of the proceedings. *See* ARCAP 11(a)(1). Thus, we reviewed the recordings only to assess the accuracy of Judge Brnovich's description of them; we did not review them for content.

[8] Husband asks us to "establish requirements as to the technical specifications of the recordings to be used" by successor judges pursuant to Rule 88. We decline this request as we are not charged with this responsibility. Additionally, the supreme court has established technical and operational requirements for digital recordings of court proceedings. *See* Ariz. Code of Jud. Admin. § 1-602.

relying on this court's decision in *Bugh v. Bugh,* 125 Ariz. 190, 192, 608 P.2d 329, 331 (App. 1980), that state workers' compensation benefits compensate a claimant for loss of earning capacity, a community asset. Husband does not challenge the *Bugh* holding but asserts it is inapplicable because FECA benefits compensate a claimant for injury to personal well-being and are therefore the claimant's sole and separate property. *See Jurek v. Jurek,* 124 Ariz. 596, 598, 606 P.2d 812, 814 (1980) (holding husband's compensation for personal injuries belong to him as separate property although compensation for medical expenses and lost wages is community property). Alternatively, Husband contends the federal government gifted the FECA benefits, thereby making them his sole and separate property. *See* A.R.S. § 25-211(A)(1) (excluding gifts from definition of community property).

¶19 Congress enacted FECA in 1916 to provide benefits to federal employees injured or killed in the course of employment. *Noble v. United States,* 216 F.3d 1229, 1234 (11th Cir. 2000). Contrary to Husband's position, FECA benefits compensate a claimant for lost wages, loss of earning capacity, and medical expenses. *See* 20 C.F.R. § 10.5 (2009) (defining "benefits" and "compensation" under FECA); *Ostrowski v. U. S. Dep't of Labor, Office of Workers Comp. Programs,* 653 F.2d 229, 231 (6th Cir. 1981) (holding purposes of FECA "include prompt assistance in meeting the employee's medical expenses and continuation of wage payments when he is injured in the course of his employment"). These benefits increase if

the claimant has a spouse or dependent children. *See* 5 U.S.C. § 8110. As previously noted, benefits paid for wage replacement and to reimburse medical expenses are community assets. *Jurek,* 124 Ariz. at 598, 606 P.2d at 814; *Bugh,* 125 Ariz. at 192, 608 P.2d at 331. Husband did not demonstrate to the family court what portion of his FECA benefits, if any, constituted compensation for injury to his personal well-being. *See In re Marriage of Geigle,* 920 P.2d 251, 256 (Wash. Ct. App. 1996) (placing burden on FECA beneficiary to show what portion of benefits represented deferred compensation [community property] and what portion represented lost future income [separate property]); *see also In re Marriage of Cupp,* 152 Ariz. 161, 163, 730 P.2d 870, 872 (App. 1986) ([t]he share of a lump-sum workers' compensation award paid during the marriage that compensated the community for lost wages during the marriage was a community asset). Absent such a showing, the family court correctly concluded that the benefits were community assets.

¶20 Finally, we are not aware of any authority supporting Husband's contention that FECA benefits are a gift. Contrary to the hallmark of a gift, the government receives something in return from FECA: A federal employee injured in the course of employment cannot sue the federal government for tort liability. *See United States v. Lorenzetti*, 467 U.S. 167, 169 (1984) ("Because the United States' liability for work-related injuries under FECA is exclusive, . . . respondent cannot recover from the United States for

losses such as pain and suffering that are not compensated under FECA.").

¶21 For these reasons, the family court did not err by concluding that Husband's FECA benefits paid during the marriage were community property. It follows, therefore, the firearms Husband purchased during the marriage using FECA proceeds were community assets. The family court did not err by characterizing them as such. In light of our decision, we need not address Husband's alternative argument that the family court erred by misconstruing his testimony about deposit of FECA proceeds into a joint account.[9]

III. Family support

¶22 A parent's legal obligation to support a child typically ceases when that child turns eighteen years of age or graduates high school, whichever occurs later. A.R.S. §§ 25-320(F) (Supp. 2008), -501(A) (2007). Under certain circumstances, however, the family court can order either or both parents to provide

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[9] Husband also complains the family court was wrong in stating he had failed to produce a comprehensive list of firearms purchased during the marriage and/or in his possession. According to Husband, he filed the lists early in the lawsuit. He fails to develop this argument, however, by explaining how this purported error harmed him. We therefore reject it. Regardless, as previously explained, *see supra* ¶ 10, the court was required to rule on the property issues based on the evidence presented at trial. *Kells*, 182 Ariz. at 483, 897 P.2d at 1369.

support for mentally or physically disabled adult children. Section 25-320, A.R.S., provides as follows:

> E. Even if a child is over the age of majority when a petition is filed or at the time of the final decree, the court may order support to continue past the age of majority if all of the following are true:
>
> 1. The court has considered the factors prescribed in subsection D[10] of this section.
>
> 2. The child is severely mentally or physically disabled as demonstrated by the fact that the child is unable to live independently and be self-supporting.
>
> 3. The child's disability began before the child reached the age of majority.

See also A.R.S. § 25-809(F) (2007) (to same effect in context of maternity and paternity actions) and A.R.S. § 25-501(A) ("In the case of mentally or physically disabled children, if the court, after considering the factors set forth in § 25-320, subsection D, deems it appropriate, the court may order support to continue past the age of majority.").

¶23 Husband argues the family court erred by denying his request that Wife pay support for their adult, disabled son Adam, who lives with Husband.

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[10] Section 25-320(D), A.R.S., requires the supreme court to establish guidelines for determining the amount of child support and lists relevant factors on which to base those guidelines.

The court found that Adam suffers from several chronic diseases and is in fact disabled. Relying on prior decisions from this court, however, the family court rejected Husband's request because he does not serve as Adam's legal custodian or guardian. Although we review the court's decision regarding the propriety of child support for an abuse of discretion, we review its interpretation of the pertinent statutes de novo as an issue of law. *Guerra v. Bejarano*, 212 Ariz. 442, 443, ¶ 6, 133 P.3d 752, 753 (App. 2006).

¶24 In *Provinzano v. Provinzano,* 116 Ariz. 571, 574-75, 570 P.2d 513, 516-17 (App. 1977), *superseded in past by statute,* A.R.S. § 25-320(B), *as recognized in Mendoza v. Mendoza,* 177 Ariz. 603, 605, 870 P.2d 421, 423 (App. 1994), this court considered the propriety of the family court's refusal to order a husband to pay child support to his ex-wife for the couple's disabled adult daughter pursuant to former A.R.S. § 25-320(B). That statute authorized the court to order support for a mentally or physically disabled child to continue past the age of emancipation "and to be paid to the custodial parent, guardian or child." *Id.* at 574, 570 P.2d at 516. Among other things, the *Provinzano* court held that the court could authorize child support for an adult disabled child when "there has been a contemporaneous or prior award of custody of the emancipated child to one of the parents at a proceeding wherein the emancipated child is a party and the issues of the mental or physical disability of the child are presented to the court by appropriate pleadings." *Id.* at 575, 570 P.2d at 517.

We have adhered to this holding in subsequent decisions.[11] *See Mendoza,* 177 Ariz. at 605, 870 P.2d at 423; *Ferrer v. Ferrer,* 138 Ariz. 138, 140, 673 P.2d 336, 338 (App. 1983). Likewise, the family court in this case followed *Provinzano*'s holding in denying support to Husband.

¶25 Husband argues the family court erred by requiring a custody or guardianship order before ordering support for Adam because the legislature removed this requirement in subsequent legislation. Wife counters, albeit without explanation, that *Provinzano* remains viable under the current statutory provision. We agree with Husband.

¶26 In 2004, the legislature redesignated subsection B of A.R.S. § 25-320 as subsection E before amending it the next year to its present form and removing the language authorizing payment "to the custodial parent, guardian or child." *See* A.R.S. § 25-320 *Historical and Statutory Notes.* Today, § 25-320(E) simply states that in the case of a disabled child, the court "may order support to continue past the age of majority" if the three criteria outlined above are

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[11] The *Provinzano* court also held that former § 25-320(B) authorized support for an adult disabled child only when the court had acquired jurisdiction before the child turned eighteen years of age. 116 Ariz. at 575, 570 P.2d at 517. In 1980, however, the legislature superseded this holding by amending § 25-320(B) to authorize the court to make such support awards even when the child reaches majority before the court obtains jurisdiction. *Mendoza,* 177 Ariz. at 605, 870 P.2d at 423.

met.[12] *See supra*, ¶ 22. Thus, under the plain language of § 25-320(E), a custody or guardianship order is not required before the court may order support for a disabled child. *Mathews ex rel. Mathews v. Life Care Ctrs. of Am., Inc.*, 217 Ariz. 606, 608, ¶ 6, 177 P.3d 867, 869 (App. 2008) (stating that if the language of a statute is clear and unambiguous we apply it without invoking secondary principles of statutory construction). By amending § 25-320(E) and removing the payee language, the legislature superseded *Provinzano* and its progeny to the extent these cases required a custody or guardianship order as a prerequisite to a support order requested by a parent pursuant to this provision.

¶27 Because the family court refused Husband's request for support for Adam solely because Husband was not Adam's legal custodian or guardian, we reverse this part of the dissolution decree and remand for further proceedings. On remand, the court should determine if Adam is disabled under the criteria set forth in § 25-320(E). If not, the court must deny Husband's request. If the court finds Adam is disabled under this provision, however, the court is

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[12] Wife contends that because § 25-320(E) authorizes the court to order support "to continue past the age of majority," a support order must exist prior to the child's emancipation in order for the court to order support under this provision. We reject this contention as § 25-320(E) explicitly provides that the court is authorized to make the award "[e]ven if a child is over the age of majority when a petition is filed," thereby making the existence of a prior support order impossible.

authorized to order either or both Husband and Wife to pay support for Adam. A.R.S. §§ 25-320(A), -501(A). The court may order payment directly to Adam or order Husband to use the support payments for Adam's benefit. In such circumstances, however, because neither Husband nor Wife serve as Adam's legal custodian or guardian, and his interests would be affected by any support order, the court should join Adam as an indispensable party to the proceedings.[13] A.R.S. § 25-314(D) (2007) (authorizing court to "join additional parties necessary for the exercise of its authority"); Ariz. R. Civ. P. 19(a) (governing joinder of indispensable parties).

CONCLUSION

¶28 For the foregoing reasons, we reverse the dissolution decree insofar as it denies Husband's request for attorneys' fees and child support and remand for further proceedings regarding these requests and to address additional issues as set forth

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[13] Prior to trial, Adam petitioned the court to permit him to intervene in the case and assert claims for support against both parents, but the court denied the request. Adam did not appeal the ruling upon entry of the final decree. Although Husband criticizes that ruling on appeal, he cannot challenge it on appeal because he is not aggrieved by it. *See In re Estate of Friedman*, 217 Ariz. 548, 552, ¶ 11, 177 P.3d 290, 294 (App. 2008) ("When an alleged error applies to only one party who does not appeal, another party cannot make that argument on the non-appealing party's behalf."); ARCAP 1 ("An appeal may be taken by any party aggrieved by the judgment.").

in the companion memorandum decision. We affirm the remaining portion of the decree.

/s/
Ann A. Scott Timmer,
Chief Judge

CONCURRING:

/s/
Michael J. Brown, Judge

/s/
Patricia K. Norris, Judge

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	No. 1 CA-CV 08-0392
CHARLES GERSTEN,	DEPARTMENT B
Petitioner/Appellee/ Cross-Appellant.	**MEMORANDUM DECISION**
v.	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure
ETHEL JOYCE GERSTEN,	
Respondent/Appellant/ Cross-Appellee,	(Filed Nov. 17, 2009)

Appeal from the Superior Court in Maricopa County

Cause No. FN2005-051436

The Honorable Susan M. Brnovich, Judge

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Charles Gersten In *propria persona*	Phoenix
The Harian Law Firm PLC By Julius Harms Attorney for Respondent/Appellant	Glendale

TIMMER, Chief Judge

¶1 Charles Gersten ("Husband") appeals from a decree of dissolution of marriage and Ethel Gersten ("Wife") cross-appeals. For the following reasons and those set forth in the companion opinion filed this date, we affirm in part and reverse and remand in part.

JURISDICTION

¶2 In carrying out our duty to independently confirm our jurisdiction over an appeal, *see Ruesga v. Kindred Nursing Centers, L.L.C.*, 215 Ariz. 589, 593, ¶ 8, 161 P.3d 1253, 1257 (App. 2007), we discovered that Husband did not file his notice of appeal timely, although he attempted to do so by delivering it to a messenger service for filing within the required time frame. Wife, believing the notice had been filed timely with the court, filed a notice of cross-appeal, which was still within the time to file a notice of appeal. Thereafter, after discovering that his notice of appeal had not been filed with the court, Husband filed a new and untimely notice of appeal. The trial court attempted to fix the situation by entering a stipulated order nunc pro tunc that Husband's late-filed notice of appeal was filed within the time frame for appeal.

¶3 Filing a timely notice of appeal is a jurisdictional prerequisite, and the trial court may extend the time for filing the notice only in limited circumstances, which were not present here. *In the Matter of 1971 Dodge Arizona License #PK-245, VIN: B-12AB1U325499,*

130 Ariz. 510, 512, 637 P.2d 312, 314 (App. 1981) ("No court possesses the power to extend the time for appeal beyond the statutory period by any form of judicial action which falls short of a reconsideration of the provisions of the judgment in point of substance so as to postpone its finality."); *see also Arizona Dept of Econ. Sec. v. Hall,* 120 Ariz. 514, 586 P.2d 1326 (App. 1978) ("The timely filing of a notice of appeal is jurisdictional, [ ] and the time for the filing of a notice of appeal as set forth in [ARCAP] 9 may not be extended by the Court."); ARCAP 5(b), 9(a). Consequently, the trial court's order, which effectively extended the time for Husband to appeal, could not make Husband's notice of appeal timely.[1] Because Wife filed her notice of cross-appeal within the time frame for appeal, and Husband's late-filed notice of appeal was filed within the time frame for a cross-appeal, however, we possess jurisdiction to consider both parties' appeals. Ariz. Rev. Stat. ("A.R.S.") § 12-2101(B), (F)(1). In doing so, however, we consider Wife the appellant and Husband the cross-appellant.

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[1] Under unique circumstances, the trial court may vacate a final judgment pursuant to Ariz. R. Civ. P. 60(c)(6) and re-enter it to permit a timely notice of appeal. *Davis v. Davis*, 143 Ariz. 54, 57, 691 P.2d 1082, 1085 (1984). Husband did not move for such relief in this case.

DISCUSSION[2]

I. Appeal

¶4 Wife currently receives $3,000 each month from the Arizona State Retirement System. She argues the family court erred by distributing the community interest in this plan between the parties rather than awarding its entirety to Wife. She correctly acknowledges that the portion of her retirement plan earned during the marriage is community property. *Kelly v. Kelly,* 198 Ariz. 307, 308, ¶ 4, 9 P.3d 1046, 1047 (2000). Nevertheless, she contends the family court should have exercised its equitable authority to award all the retirement income to her in light of the fact Husband earns income from the Federal Employees' Compensation Act ("FECA"), 5 United States Code ("U.S.C.") section 8101 et seq. (2006), that is not subject to post-decree division. *See Bugh v. Bugh,* 125 Ariz. 190, 193, 608 P.2d 329, 332 (App. 1980) ("[T]he workmen's compensation award received after dissolution of marriage for injuries received during marriage is the separate property of the worker."). We review the apportionment of community property for an abuse of discretion. *Hrudka v. Hrudka,* 186 Ariz. 84, 93, 919 P.2d 179, 188 (App. 1995).

¶5 The family court is obligated to divide community property "equitably, though not necessarily in

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[2] The background of this case is set forth in the companion opinion and not repeated herein.

kind," between the parties to a divorce. A.R.S. § 25-318(A). Section 25-318(A) "requires a substantially equal distribution of community assets in the absence of a compelling reason to the contrary." *Kelly,* 198 Ariz. at 309, ¶ 7, 9 P.3d at 1048. Wife argues that dividing the community share of her retirement income equally with Husband leads to an inequitable result, both because Husband's FECA benefits are non-divisible, leaving him with greater resources, and because the division diminishes her ability to meet her financial needs. Husband takes the contrary position. We agree with Husband.

¶16 In *Kelly,* the supreme court addressed an argument similar to the one now urged by Wife. In that case, both parties received federal retirement benefits, but a component of Wife's retirement consisted of social security benefits, which were her sole and separate property. 198 Ariz. at 308, ¶¶ 1-2, 9 P.3d at 1047. Relying on the principle that an equitable division of community property includes the concept of fairness, the supreme court held that because community property (wife's salary) was paid into the social security system and resulted in wife's separate benefit, the court should deduct the value of that benefit from husband's retirement before dividing it. *Id.* at 309, 1111 9-11, 9 P.3d at 1048. As the family court noted, unlike the situation in Kelly, community property was not used to fund Husband's FECA benefit. Rather, this benefit stems from Husband's accident and constitutes workers' compensation, which is considered his sole and separate property

after dissolution of the marriage. *Bugh*, 125 Ariz. at 193, 608 P.2d at 332. Accordingly, the family court did not err by refusing to award Wife the entire community retirement benefit to account for her inability to realize a community share of Husband's FECA benefit.

¶7 Additionally, we cannot say the family court abused its discretion by dividing the community share of Wife's retirement in light of the parties' post-dissolution decree financial resources. Husband receives $2,889.42 in monthly non-taxable FECA and social security income. Assuming he receives roughly one-half of Wife's $3,000 retirement benefit, his monthly income post-dissolution decree is approximately $4,389, exclusive of any monies realized from investment accounts divided by the parties. After splitting her retirement, Wife receives per month approximately $1,500 in retirement benefits, $700 from an Educators Preferred Corporation ("EPC") annuity, and sporadic amounts for substitute teaching for a total monthly taxable income of $2,262, exclusive of monies realized from investment accounts divided by the parties. Although EPC annuity payments will cease in 2012, wife will be eligible at that time to collect full social security benefits.

¶8 Pursuant to A.R.S. § 25-318(A), the family court is given discretion on a case-by-case basis to decide what constitutes an equitable division of property. *Toth v. Toth,* 190 Ariz. 218, 221, 946 P.2d 900, 903 (1997). Generally, "all marital joint property should be divided substantially equally unless sound reason

exists to divide the property otherwise." *Id.* Although the above comparison of the parties' post-dissolution decree is not equal, other evidence supported the court's implicit finding that it was equitable. Wife is able to continue working as a substitute teacher, while Husband apparently cannot work due to his disability. The court awarded Wife a condominium purchased substantially with community funds as her sole and separate property because Husband had signed a disclaimer deed. The court also ordered Husband to pay Wife $102,500 as an equalization payment for her fifty percent share of the marital home awarded to Husband. The court further awarded her one-half of the proceeds from the sale of a specified number of guns from Husband's collection, all jewelry acquired during the marriage, and found that an inheritance from her mother was Wife's sole and separate property. Also, Adam, the parties' disabled adult son, lives with Husband, without apparent financial assistance from Wife. Although Wife contends she is in danger of not meeting her monthly financial needs, she offers no explanation to support this contention. Considering this evidence, we cannot say the family court abused its discretion to make an equitable division of property.

II. Cross-Appeal

A. Compliance with Rule 82(A)

¶19 Husband argues the family court erred by failing to make findings of fact and conclusions of law

pursuant to Arizona Rule of Family Law Procedure ("ARFLP") 82(A), which requires the court to make such findings and conclusions if requested prior to trial. He has waived this challenge, however, by raising it for the first time on appeal. *Van Loan v. Van Loan,* 116 Ariz. 272, 274, 569 P.2d 214, 216 (1977) (acknowledging that issues first raised on appeal are waived). Regardless, we reject his argument. Husband did not request findings of fact and conclusions of law prior to trial, and, therefore, Rule 82(A) was not triggered. Also, after considering the portions of the record reviewed, including Husband's proposed findings of fact and conclusions of law concerning a single issue, the court made comprehensive findings of fact and conclusions of law sufficient to discern the basis for its rulings. *See Miller v. Bd. of Sup'rs of Pinal County,* 175 Ariz. 296, 299, 855 P.2d 1357, 1360 (1993) (holding findings of fact satisfy Arizona law if they are "pertinent to the issues and comprehensive enough to provide a basis for the decision"); *Kelsey v. Kelsey*, 186 Ariz. 49, 51, 918 P.2d 1067, 1069 (App. 1996) (concluding court charged with making findings and conclusions must make clear how court arrived at conclusions).

B. Property division

¶10 Husband asserts the family court violated A.R.S. § 25-318(A) by failing to allocate Wife's EPC annuity and Husband's life insurance policies. In denying Husband's motion for new trial, the court stated that Husband never argued he was entitled to

a portion of the EPC annuity, and the parties had failed to present evidence about the existence or status of the life insurance policies. We review the court's ruling for an abuse of discretion. *Harris*, 195 Ariz. at 561, ¶ 6, 991 P.2d at 264.

¶11 The court was mistaken that Husband never sought a portion of the EPC annuity. He testified at trial that the annuity was community property because it was "based on [Wife's] work during the marriage." In their respective closing memoranda, Husband asked the court to award him a community share of the annuity, and Wife argued that such a disbursement would unfairly disrupt her income stream. Wife urges us to affirm the non-allocation of the EPC annuity because the evidence did not support a conclusion that the annuity was community property. We decline to decide the merits of the parties' arguments in the first instance, however, as a determination of the character of the EPC annuity is dependent, in significant part, on the family court's view of the evidence. Moreover, assuming the annuity is a community asset, the family court must exercise its discretion to determine whether and to what extent a distribution of the annuity to Husband would be equitable. We therefore remand for the court to make these determinations.

¶12 The parties both assert that the family court was mistaken that no evidence existed regarding the existence and status of Husband's life insurance policies. Husband testified he purchased a universal life insurance policy through Massachusetts Mutual with

an issue date of January 21, 2003. Around the time of trial, the policy had a cash value of $17,048.80.[3] Husband contends the policy is his sole and separate property because he purchased it with FECA funds. Wife counters the policy is a community asset as it was purchased during the marriage. Because sufficient evidence was presented regarding the existence and value of the universal life insurance policy, we remand for the family court to determine whether the policy is Husband's separate property or a community asset. Assuming the latter, the court should allocate the policy.

ATTORNEYS' FEES ON APPEAL

¶13 Husband requests attorneys' fees pursuant to A.R.S. §§ 12-341.01(A) (2003), 25-324(A) (Supp. 2008), 25-318(A) (Supp. 2008), ARCAP 21(c)(1), and ARFLP 65(A)(4). With the exception of A.R.S. § 25-324, none of these provisions provide a basis for this court to award fees to Husband. Section 12-341.01(A) authorizes attorneys' fees for the prevailing party in a dispute arising out of a contract and does not apply here. Section 12-318(A) deals with disposition of property following dissolution of a marriage and likewise does not provide a basis for an award of attorneys' fees. Rule 65(A)(4), ARFLP, authorizes fees in discovery disputes in the family court. Rule 21(c)(1),

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[3] Although Husband also had a term policy with Massachusetts Mutual, the policy had no cash value.

ARCAP, outlines the procedure for requesting fees on appeal but does not substantively authorize those fees.

¶14 Section 25-324, A.R.S., authorizes an award of attorneys' fees on appeal after the court considers "the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings." In this case, Husband's and Wife's financial resources are similar, and neither party took unreasonable positions on appeal. Therefore, in our discretion, we decline Husband's request for an award of attorneys' fees on appeal. Because Husband substantially prevailed in the appeal and cross-appeal, however, we award him costs on appeal.

CONCLUSION

¶15 For the foregoing reasons and those set forth in the companion opinion, we reverse the dissolution decree insofar as it denies Husband's requests for attorneys' fees and child support and remand for further proceedings regarding these requests. On remand, the court must also determine whether and to what extent to allocate Wife's EPC annuity and Husband's universal life insurance policy. We affirm the remaining portion of the decree.

/s/
Ann A. Scott Timmer,
Chief Judge

CONCURRING:

/s/
Michael J. Brown, Judge

/s/
Patricia K. Norris, Judge

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:	No. 1 CA-CV 08-0392
ETHEL JOYCE GERSTEN,	DEPARTMENT B
Respondent/Appellant/ Cross-Appellee,	MARICOPA County Superior Court No. FN 2005-051436
v.	**ORDER**
CHARLES GERSTEN,	(Filed Jan. 19, 2010)
Petitioner/Appellee/ Cross-Appellant.	

The court has received and considered the Statement of Costs filed by Charles Gersten ("Husband") on November 27, 2009; Motion for Reconsideration filed by Ethyl Joyce Gersten ("Wife") on December 2, 2009; Wife's Objection to the Statement of Costs filed on December 3, 2009; Husband's Reply to the Objection filed on December 11, 2009; Motion for Reconsideration filed by Husband on December 21, 2009; and Motion for Sanctions filed by Husband on December 31, 2009.

Although our memorandum decision did not specify the basis for our award of costs to Husband, we did so pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-331 and 12-332 and not pursuant to A.R.S. § 25-320, as Husband surmised. Pursuant to §§ 12-331 and -332, Husband is not entitled to recover his costs for the following items:

Messenger service ($89.00)

Photocopying, printing and other fees relating to legal research ($2,304.88)

Postage ($489.30)

Parking ($66.00)

CDs of court recordings ($140.00)

Husband is entitled to recover the remainder of his claimed costs.

IT IS ORDERED granting Husband costs in the total amount of $3,560.76 and denying the remainder of his request.

After careful consideration,

IT IS FURTHER ORDERED denying the Motion for Reconsideration filed by Wife on December 2, 2009.

IT IS FURTHER ORDERED denying the Motion for Reconsideration filed by Husband on December 21, 2009.

IT IS FURTHER ORDERED denying the Motion for Sanctions filed by Husband on December 31, 2009.

DATED this 19th day of January, 2010.

/s/ Ann AS Timmer
Ann A. Scott Timmer,
Chief Judge

A true copy of the foregoing
was mailed January 19, 2010 to:

Julius Harms
The Harrian Law Firm PLC
5616 W Glendale Avenue
Glendale AZ 85301
Attorneys for: Respondent/
Appellant-Cross Appellee

Charles Gersten
3930 West Cholla Street
Phoenix AZ 85029-3814

Philip G Urry, Clerk
By

/s/ Donna Likewise
Deputy Clerk

ADELMAN LAW OFFICE, P.C.
3030 North Central Avenue, Suite 1405
Phoenix, Arizona 85012-2720

TEL (602) 265-4369; FAX (602) 265-1515

Bette O. Adelman, # 010544
Attorneys for Petitioner

ARIZONA SUPERIOR COURT
MARICOPA COUNTY

In Re the Marriage of: CHARLES GERSTEN, Petitioner, and ETHEL JOYCE GERSTEN, Respondent.	**No: FN 2005-051436** **ORDER DENYING MOTION FOR NEW TRIAL** **ASSIGNED TO JUDGE PRO TEM SUSAN BRNOVICH**

Petitioner, CHARLES GERSTEN, by and through his undersigned counsel and pursuant to the court's minute entry dated March 13, 2008, hereby submits this Final Order Denying Motion For New Trial for the court's approval, as follows:

The Court has reviewed Petitioner's Motion for New Trial, Respondent's Response to Petitioner's Motion for New Trial, Petitioner's Amended Motion for New Trial, Respondent's Response to Petitioner's Amended Motion for New Trial and Petitioner's Reply.

Petitioner first argues that because the Court did not review the entire court file, including all pre-trial motions, it could not have ruled on the trial proceedings. However, a basic rule related to trial proceedings is that the Court can only consider evidence and arguments presented at trial. Unless a document is offered as evidence at trial, the Court cannot consider it so there cannot be error related to not considering motions filed and ruled on months *prior to trial.* See *In re Marriage of Kells,* 182 Ariz. 480, 897 P.2d 1366 (Ariz.App.Div.2 1995).

In Petitioner's Reply, he notes that the sound quality of the recording goes down as the parties step away from the microphones. Although this is true, adjustments can be made to the volume through the FTR program. As the Court did this, there was no problem hearing anything that was said during trial while the trier of fact was on the bench.

Petitioner next argues that the Court erred in its assessment of Wife's misbehavior prior to trial. First, the Court was well aware of Petitioner's allegations of misconduct as they were raised at trial. Second, Judge Martin ruled on the admissibility of evidence at trial and he was aware of his discovery orders. This Court's assessment of whether to award attorney fees was based on the arguments raised at trial and the Court's assessment of the parties' credibility at trial.

This Court cannot address Judge Martin's alleged bias towards Petitioner. However, Petitioner's factual basis for this allegation shows that Judge Martin took remedial action to remedy any error when he continued the trial to allow additional time for Husband to obtain his discovery.

Petitioner next argues that the Court failed to consider Husband's exhibit as evidence of his gun collection. However, this Court copied Husband's list into the Decree, which shows that the Court did consider it. The Court did note that Husband's list was not complete as he never testified that it had every gun listed, and the list did not include any of the safes or other gun accessories that existed.

Petitioner's argument regarding his FECA income was addressed in the Decree.

Petitioner's argument regarding child support was addressed in the Decree.

Petitioner finally argues that the Court neglected to allocate Wife's EPC annuity and parties' life insurance policies. The Court disagrees. Wife's EPC annuity was never discussed at trial, other than to determine Wife's income. Petitioner never argued that he was entitled to a portion of the annuity. The parties' life insurance policies were discussed at trial, but no evidence as to their existence or status was presented.

IT IS ORDERED denying Petitioner's Motion for New Trial and Amended Motion for New Trial.

DATED: 4-3-08

/s/ Susan Brnovich
THE HONORABLE
SUSAN BRNOVICH
JUDGE PRO TEM OF
THE SUPERIOR COURT

ORIGINAL and two copies of the foregoing lodged this 1st day of April, 2008, with:

Judge Pro Tem Susan Brnovich
Maricopa County Superior Court
18380 N. 40th Street
Phoenix, Arizona 85032

COPY of the foregoing mailed this same day to:

Julius F. Harms, III, Esq.
Bellah & Harrian, PLLC
5622 W. Glendale
Glendale, Arizona 85301
Attorney for Respondent

By: /s/ Selena Hinton

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FN 2005-051436 01/04/2008

JUDGE PRO TEM
SUSAN M. BRNOVICH

CLERK OF THE COURT
D. Kenney
Deputy

IN RE THE MARRIAGE
OF CHARLES GERSTEN SONYA E UNDERWOOD

AND

ETHEL JOYCE GERSTEN JULIUS F HARMS III

ADAM GERSTEN
3930 W CHOLLA ST
PHOENIX AZ 85029-3814
DOCKET – NE
FAMILY COURT
SERVICES – CCC

DECREE OF DISSOLUTION OF MARRIAGE

The Court has now had an opportunity to review the trial exhibits; FTR recordings from July 9, 10, 11 and 12, 2007; FTR recordings from October 17 and 18, 2007; Petitioner's Closing Memorandum; Petitioner's Proposed Findings of Fact and Conclusions of Law Re: Petitioner's Monies Received From the Federal Government Under F.E.C.A.; and Respondent's Closing Brief. The Court had no problems with any of the FTR recordings and was able to hear and see all of the testimony. Therefore,

THE COURT FINDS that a final ruling on this case may be made without prejudice to the parties, pursuant to Rule 63 of the Arizona Rules of Civil Procedure.

Exhibit 68 was offered into evidence and Judge Martin took this under advisement. After review of the direct testimony and cross, the objection is overruled. Exhibit 68 is received in evidence.

The Court makes the following findings of fact:

The parties were married on November 7, 1975 and separated for the last time in July 2002. Husband filed a Petition for Dissolution on October 27, 2005. Wife accepted service of process on January 12, 2006.

The parties have two children in common, Adam and Rachel. Both children are over the age of 18. Adam is 31 years old, is disabled and currently lives with his father. There has never been a custody order or guardianship related to Adam.

The parties bought the house on Cholla together and both lived in the home until Wife left in 2002. The house was virtually paid for at the time she left. Husband testified that he paid off the last $8,000-$10,000. During the marriage, the house payments were made from a joint account supplied by money from Wife's income and husband's federal income. The home is community property and has an appraised value of $205,000.

After the parties' separation, Wife purchased a second home. Wife used money that she took from a joint account and borrowed from her mother. Wife made the mortgage payments from her income. Husband signed a disclaimer deed on September 30, 2002. Rachel took her father to the bank after she and her mother called to see if he would agree to sign a quit claim deed. He then signed the deed in front of a notary who then notarized the deed. Husband claims that he didn't know what he was signing because he was under the influence of his prescription medication.

Husband said that Rachel came into the home, dressed him and took him to the bank. Rachel testified that he was dressed and ready to go when she got to his house. There is no question that Husband was on medication, but he had been on medication for quite a while before that date and continues to be on medication. There was testimony from Rachel and Husband that he has good days and bad days while on his medication. Rachel testified that he was fine on the way to the bank and on the way back. He never complained about going or complained about signing the document. In addition, there was a 6 month period before escrow closed on Wife's home and Husband never raised the issue. Husband didn't raise the issue until three years later. Husband testified that he didn't raise it because he didn't find a copy of the deed until then. However, Adam and Husband both testified they both knew that Husband went to the bank with Rachel and that he signed a document.

They have both shown this Court that they know how to search the internet and use the court process to find information. The Court believes that Husband voluntarily signed the deed at the time, but had a change of heart after filing his Petition for Divorce.

Although the condominium would have been community property absent the disclaimer deed, the parties are free to change the status of a piece of property and that is what they did.

THE COURT FINDS that the condominium is Wife's sole and separate property.

Husband was disabled shortly after the marriage while he was on the job as a United States postal employee. Husband has been receiving workmen's compensation under FICA [sic]. Husband is currently receiving a small amount of money from social security also. Husband's gross income at this time is $2,889.42. His income is tax free.

Wife worked as a school teacher during the marriage. She retired from the Peoria School District in 2005. She currently receives income from the Arizona State Retirement System at $3,000 per month; EPC at $700 per month and some additional funds from substitute teaching. Her total gross monthly income is $3,762.00.

Husband has a gun collection. The collection includes handguns, rifles, safes, and gun accessories. There are 3 groups of guns: the first group includes guns owned prior to the marriage; the second group

includes guns gifted to Husband from his brothers; and the third group includes guns purchased during the marriage. Husband has all of the guns in his possession at the marital residence. Husband is the collector. Despite that, Husband never produced one comprehensive list of all the guns in his possession. Nor did he produce a list or testify as to which guns, specifically, were purchased during the marriage. He testified that he bought the guns with his federal income; however, he said that 90% of that money went into the joint account and thereby became community property. The Court is left with Exhibits 30, 31 and 69 to determine which guns fall into groups one or two.

THE COURT FINDS that the following guns are Husband's sole and separate property because they fall into groups one or two:

Manufacturer	Model	Caliber	Serial #
S & W	61	.22 L.R.	B1911
H & R	999	.22 S.L.L.R.	Y2528
S & W	34	.22 S.L.L.R.	95139
Hi Standard Tournament		.22 L.R.	1194851
Walther	PPK-S	.22 L.R.	1230425
Bauer	25 SSP	.25 A.C.P.	004123
S&W	60	.38 Special	656347
S&W	49	.38 Special	587002
Walther	PPK-S	.380 A.C.P.	1597925
S&W	39	9 mm	105305

S&W	39-2	9 mm	107580
Astra	600	9 mm	35941
Browning	P-35	9 mm	T148642
S & W	19	.357 Magnum	K730208
Colt	Python	.357 Magnum	E12037
S & W	29-2	.44 Magnum	S230204
S & W	29	.44 Magnum	S193287
Colt	1911A1 Target	.45 A.C.P.	317722-C
Colt	1911A1 National Match	.45 A.C.P.	21198975
Webley	MK III	.45 A.C.P.	10290
Ruger	Super Blackhawk	.44 Magnum	6458
S & W	M66 Stainless	.357 Magnum	2K68962
TDE	Auto Mag Model 180	.44 A.M.P.	AO 4787
S & W	M35 22/ 32 Target	.22 S.L.L.R.	M53592
Browning	Medalist	.22 L.R.	9254017
Colt	Gold Cup	45 A.C.P.	70N11633
S & W	M35	22/32 Target	
S & W	M66	Stainless steel .357 Magnum	
Colt	Diamondback	22 LR	D39199

U.S. Springfield	1903 MKI	.30'06	11451
U.S. Springfield	1903A3	.30'06	4020595
U.S. Enfield	1917(REM)	.30'06	348951
U.S. Enfield	1917(REM)	.30'06	646957
U.S. Rifle	MI(Springfield)	.30'06	3583769
U.S. Rifle	MI Nat'l Match	.30'06	5419072
Sako Finnbear	LG1R	.375 H&H	451
Sako Forester Deluxe	L579	.243 Winch.	15733
Remington	721	.300 WBY	81547
Colt AR-15	SP1 with scope	.223(5.56MM)	19239
Colt AR-15		.223(5.56MM)	16211
Colt AR-15	with scope	.223(5.56MM)	12509
Ithaca	X-15	.22 L.R.	16030-AT
Marlin	M-39	.22 S.L. L.R.	692783
U.S. Carbine	MI	.30 MI Carb.	53515
U.S. Carbine	MI	.30 MI Carb.	4038898
U.S. Carbine	MIAI	.30 MI Carb.	1537887
Valmet	M62 with scope	7.62 MM x 39 MM	131691
Mauser	M98'09	7.65 M.M.	B7879
Savage	M110LC	.30'06	A123015

Cetme	Sport	7.62 MM (.308W)	S025999
AR Sales Co.	MK *IV*	7.62 MM (.308W)	0002
L.H. Gunco	MIA National Match	7.62 MM (.308W)	00444
FNFAL	762 MM NATO	with scope	1206
FNFAL	762 MM NATO	with scope	868

There was some testimony about a jewelry collection; however, neither party presented any evidence of what was in the collection. Husband's position was that Wife should keep all the jewelry.

There are several investment accounts that were created during the marriage mostly through Wife's job and in her name. Wife failed to produce a complete list of those accounts or what they were worth at the time the divorce action was filed. The Court has used the testimony of the parties in conjunction with Exhibits 48, 49, 51, 52, 56, 71, 73, 82, 84, 90, 91 and 94 to establish the community accounts.

THE COURT FINDS that the following accounts are community assets:

- Vanguard Health Care Fund Investor Acct# 0052/09901789515
- Raymond James Acct#73969692

- Best of America Account (number unknown)
- Fidelity Account (number unknown)

Wife received an inheritance from her mother in 2005. The inheritance is Wife's sole and separate property.

Wife's Retirement account:

Wife is currently receiving income from the Arizona State Retirement System (ASRS). This fund was created entirely during the marriage and is a community asset. Wife is asking that the entire amount be awarded to her on the basis of equity, She argues that it is inequitable to give Husband half of her retirement because she cannot be awarded half of his F.E.C.A. payments. Wife argues that *Kelly v. Kelly*, 198 Ariz. 307, 9 P.3d 1046 (2000) allows this Court to make an equitable exemption of this property from division as community property. In *Kelly v. Kelly* and *Kohler v. Kohler*, the Arizona Court of Appeals recognized that in some cases, it may be inequitable to equally distribute one party's retirement account. It may be inequitable where one party used community assets to contribute to social security and one party used community assets to contribute to a retirement account. In such a case, the retirement account can be split, but federal law prohibits social security benefits from being divided. In such a case, community funds used to contribute to social security are diverted to benefit only one party.

In this case, no community funds were used to contribute to FECA. This money comes as a result of Husband's accident back in 1976 and is in the form of workmen's compensation. The Arizona Court of Appeals has ruled that workmen's compensation is awarded to an injured employee in lieu of lost wages. That income is community property during the marriage, but is the employee's sole and separate property after the marriage. *Bugh v. Bugh,* 125 Ariz. 190, 608 P.2d 329 (Ariz.App. 1980). Considering the Court's view that workmen's compensation is in lieu of lost wages, it's considered wages after the divorce, which would be Husband's sole and separate property. It is as if Husband continued to work during the marriage, but did not contribute to social security or retirement. Thus, no community funds were diverted to Husband. Therefore, the Court does find that *Kelly v. Kelly* does not apply.

I. DISSOLUTION OF MARRIAGE.

THE COURT FINDS that at least one of the parties has been domiciled in the State of Arizona for more than 90 days immediately preceding the filing of the Petition; that the conciliation provisions of A.R.S. § 25-381.09, and the domestic relations education provisions of A.R.S. §25-352 either do not apply or have been met; that the marriage is irretrievably broken and there is no reasonable prospect for reconciliation.

To the extent it has jurisdiction to do so, the Court has considered and made provisions for maintenance and disposition of property, and, where applicable, support, custody and visitation.

IT IS ORDERED that the marriage heretofore existing between the parties is dissolved, and each party is returned to the status of a single person effective upon the signing and entry of this Decree.

II. CHILD SUPPORT.

Father is requesting child support for Adam, the parties' 30 year old son. Father argues that he is entitled to support because his son lives with him and is disabled. First, the Court finds that Adam is in fact disabled. Adam has several chronic diseases and has a morphine pump implanted in his side to help with the chronic pain.

As a general rule, a parent's legal obligation to support a child terminates when the child turns 18 or graduates high school, but no longer than age 19. A.R.S. 13-320(4).

A.R.S. §25-501 states in part: "In the case of mentally or physically disabled children, if the court, after considering the factors set forth in 25-320, subsection D, deems it appropriate, the court may order support to continue past the age of majority." In order for child support to be ordered through a dissolution proceeding for a child that has already past the age of majority, there must be "a contemporaneous or prior

award of custody of the emancipated child to one of the parents at a proceeding wherein the emancipated child is a party and the issues of the mental or physical disability of the child are presented to the court by the appropriate pleadings." *Ferrer v. Ferrer*, 138 Ariz. 138, 673 P.2d 336 (App. 1983); *Mendoza v. Mendoza*, 177 Ariz. 603 (App. 1994).

There has been no evidence of any prior custody order or guardianship order, therefore;

IT IS ORDERED denying petitioner's request for child support.

III. SPOUSAL MAINTENANCE.

THE COURT FINDS that neither party meets the criteria set forth in A.R.S. §25-319(A) for an award of spousal maintenance. Accordingly,

IT IS ORDERED that spousal maintenance is not awarded to either party.

IV. PROPERTY DIVISION.

Gun Collection:

As discussed above, there are three groups of guns in the collection. The Court specifically designated which guns are Husband's sole and separate property. The guns belonging in group 3 include all remaining guns, This third group of guns is presumptively community property. *Anderson v. Anderson*, 65 Ariz. 184, 177 P.2d 227 (1947). The burden to rebut

the presumption is on Husband because he is claiming them as his sole and separate property. *Tyson v. Tyson* 61 Ariz. 329; 149 P.2d 674 (1944). Husband has not rebutted that presumption.

IT IS ORDERED that any guns listed above as belonging to Group one or two are designated as Husband's sole and separate property.

IT IS FURTHER ORDERED that any guns and accessories not specifically enumerated above shall be sold through a legitimate gun dealer and the proceeds be divided equally between the parties.

Jewelry Collection:

IT IS ORDERED awarding Wife the jewelry currently in her possession and any loose stones in husband's possession.

Investment Accounts:

IT IS ORDERED awarding 50% of the community accounts listed above to Wife. Wife shall execute any and all documents necessary to transfer or rollover 50% to Husband.

IT IS FURTHER ORDERED awarding 50% of the community accounts listed above to Husband.

IT IS FURTHER ORDERED awarding 50% of any other 403(b) accounts to Husband.

IT IS FURTHER ORDERED that Husband shall receive his 50% of the community accounts within 30 days of this Decree. The valuation date shall be July 1, 2002, because there was evidence that Wife took money out of the accounts after the parties' separation. This will resolve the question of what she took out by going back to the time of separation, Wife must provide proof of the balance on all the accounts as of July 1, 2002.

ASRS account:

IT IS ORDERED that the community interest in Wife's retirement plan through ASRS is to be distributed between Husband and Wife through a separate Qualified Domestic Relations Order (QDRO), in a form which is to be separately entered and approved by the Court. All the terms and conditions of the QDRO shall be incorporated into and made a substantive part of the Decree.

IT IS FURTHER ORDERED that the parties shall split the cost of the QDRO evenly. The parties must choose an attorney and pay the fees for the QDRO within 30 days of the Decree.

Real Property:

IT IS ORDERED awarding to Husband as his sole and separate property, subject to any liens or

encumbrances thereon, the residence and real property located at 3930 W. Cholla Street, Phoenix, Arizona 85029.

The legal description is as follows: Lot 97, Fairwood Unity Six MCR 183-4.

IT IS FURTHER ORDERED that Husband pay to Wife $102,500 as an equalization payment for her 50% share of the home. Said payment shall be made within 90 days of the Decree.

IT IS FURTHER ORDERED awarding to Wife as her sole and separate property, subject to any liens or encumbrances thereon, the residence and real property located at 16036 N. 11th Ave. #1002, Phoenix, Arizona, and more specifically described as follows:

Villas at Moon Valley Condominium MCR 497-19 Unit 2.

Automobiles:

IT IS ORDERED awarding to each party the ear in their respective possessions, subject to any liens or encumbrances thereon.

Personal Property:

IT IS ORDERED awarding to each party all personal effects, household items, and furnishings in their respective possessions.

V. COMMUNITY DEBTS.

IT IS ORDERED that each party shall pay any debt incurred by him or her respectively since the date of the parties' separation.

VI. ATTORNEY'S FEES.

The Court has considered the financial resources of both parties in accordance with A.R.S. §25-324 as well as the reasonableness of the parties. The Court finds that both parties participated poorly in these proceedings. Neither side was forthcoming with information about assets. Both sides made false statements at one point or another. Therefore,

IT IS ORDERED denying both requests for attorney fees.

IT IS FURTHER ORDERED signing this minute entry as a formal order of this Court pursuant to Rule 81, *Arizona Rules of Family Law Procedure.*

/s/ Susan Brnovich
JUDICIAL OFFICER OF
THE SUPERIOR COURT

FILED: Exhibit Worksheet

All parties representing themselves must keep the Court updated with address changes. A form may be downloaded at: http://www.superiorcourt.maricopa.gov/SuperiorCourt/SelfServiceCenter.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FN 2005-051436 11/20/2007

JUDGE PRO TEM
SUSAN M. BRNOVICH
FOR HONORABLE
GREGORY H. MARTIN

CLERK OF THE COURT
D. Galligan
Deputy

IN RE THE MARRIAGE
OF CHARLES GERSTEN SONYA E UNDERWOOD

AND

ETHEL JOYCE GERSTEN JULIUS F HARMS III

MINUTE ENTRY

(Filed Nov. 28, 2007)

Courtroom 102 – Northeast Regional Court Center

2:20 p.m. This is the time set for Telephonic Status Conference. Petitioner is not present but is represented telephonically by counsel, Sonya Underwood. Respondent is not present but is represented telephonically by counsel, Julius Harms.

A record of the proceedings is made by CD/videotape in lieu of a court reporter.

Discussion ensues between the Court and Counsel with regards to the matter being taken under advisement previously by Judge Martin.

Over the objection by Counsel for Petitioner,

Pursuant to Rule 63 of the Rules of Civil Procedure, the Court will review the F.T.R. (For The Record) and will proceed with the under advisement ruling.

All parties representing themselves must keep the Court updated with address changes. A form may be downloaded at: http://www.superiorcourt.maricopa.gov/SuperiorCourt/SelfServiceCenter.

[SEAL]

Supreme Court
STATE OF ARIZONA

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 452-3396

RACHELLE M. RESNICK
CLERK OF THE COURT

SUZANNE D. BUNNIN
CHIEF DEPUTY CLERK

May 21, 2010

RE: CHARLES GERSTEN v ETHEL GERSTEN
Arizona Supreme Court No. CV-10-0033-PR
Court of Appeals Division One
No. 1 CA-CV 08-0392
Maricopa County Superior Court
No. FN 2005-051436

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 20, 2010, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

FURTHER ORDERED: Cross-Petition for Review = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees [Appellant/Cross-Appellee E. Gersten] = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 21st day of May, 2010.

Rachelle M. Resnick, Clerk

TO:
Charles Gersten
Michael E. Cordrey
Philip G. Urry
sj